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TRADEMARKS AS ENTREPRENEURIAL CHANGE AGENTS FOR LEGAL REFORM*

DEBORAH R. GERHARDT**

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INTRODUCTION

Public distrust of news media and government create an ideal environment for trademarks to emerge as change agents for legal reform. At first glance, it may seem odd to consider the parallels between law and entrepreneurship. Politicians make rules; entrepreneurs break them. Laws delineate the status quo; entrepreneurs succeed when they disrupt it. Despite their differences, these two fields of public engagement have much in common. They both involve constant rethinking and adjustment. Legislatures perpetually rewrite legislation in response to national, state, and local value judgments. Brand communities, like governments, also must change with the values of their constituents or risk irrelevance.

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This Essay proposes that in politically volatile times, corporate groups, nonprofits, universities, and arts organizations will inevitably find themselves forced to choose whether to engage with politics. They may generally prefer to remain politically agnostic. But if their brands are linked with culturally salient core values, the authenticity of that commitment may be tested when prevailing political and cultural norms conflict with brand values.

Even brands never intended to be political may prompt partisan reactions. In 2016, Anheuser-Busch planned a patriotic advertising campaign that coincided with the summer Olympics and the presidential campaign.¹ In the opening ad, the company renamed its Budweiser beer “America.”² Later in the series, it ran a Super Bowl advertisement telling its founders’ immigration story.³ The campaign was not meant to be partisan.⁴ Nonetheless, in the volatile political moment, the values portrayed in the ads clashed with public perceptions of what it means to be American. Liberals criticized the campaign for portraying an overly idealistic and rural vision of America that leaves out the nation’s cities.⁵ A few months later, the immigration advertisement became a political flashpoint prompting conservative boycotts after President Donald Trump issued a controversial travel ban.⁶

In a charged political environment, brand owners must carefully consider the specific core values they wish to project. In the face of

1. Mark Wilson, *Budweiser Renames Its Beer “America”*, CO.DESIGN (May 10, 2016, 7:00 AM), <https://www.fastcodesign.com/3059681/budweiser-renames-its-beer-america> [https://perma.cc/3N25-CLXD].

2. See Budweiser, *Budweiser 2017 Super Bowl Commercial “Born the Hard Way”*, YOUTUBE (Jan. 31, 2017), <https://www.youtube.com/watch?v=HtBZvl7dIu4>.

3. See Vinson Cunningham, *Budweiser and the Selling of America*, NEW YORKER (May 18, 2016), <http://www.newyorker.com/culture/cultural-comment/budweiser-and-the-selling-of-america> [https://perma.cc/CGB6-FXTL].

4. Kristina Monllos, *How Budweiser Created an Epic Immigrant Story to Reclaim the Super Bowl Spotlight*, ADWEEK (Jan. 29, 2017), <http://www.adweek.com/brand-marketing/how-budweiser-created-an-epic-immigrant-story-to-reclaim-the-super-bowl-spotlight/> [http://perma.cc/C4BG-NMNQ].

5. See Vinson Cunningham, *Budweiser and the Selling of America*, NEW YORKER (May 18, 2016), <http://www.newyorker.com/culture/cultural-comment/budweiser-and-the-selling-of-america> [https://perma.cc/CGB6-FXTL].

6. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); *Donald Trump Supporters Call for Budweiser Boycott Over Pro-Immigration Ad*, CHI. TRIB. (Feb. 6, 2017, 9:08 AM), <http://www.chicagotribune.com/business/ct-trump-supporters-budweiser-boycott-20170206-story.html> [https://perma.cc/AC8E-YY5N]; Kate Taylor, *People Are Threatening to Boycott Budweiser Because of Its Immigration-Themed Super Bowl Ad*, BUS. INSIDER (Feb. 5, 2017, 9:16 AM), <http://www.businessinsider.com/budweiser-boycott-super-bowl-ad-2017-2> [https://perma.cc/S6Z8-EQ67]. In the immigration ad, Adolphus Busch overcomes a shipwreck and angry men shouting “you’re not welcome here” before meeting the friendly Anheuser in a bar. See Budweiser, *supra* note 2.

controversy silence can lead to a loss of brand meaning. Alternatively, those who speak may find it possible to increase brand value and emerge as leading political or cultural voices.

In *Citizens United v. Federal Election Commission*,⁷ the Supreme Court held that corporations, like natural persons, have free speech rights protected by the First Amendment.⁸ Overruling its decision in *Austin v. Michigan Chamber of Commerce*,⁹ the Court held that Congress's efforts to limit political contributions from corporations were unconstitutional.¹⁰ Justice Stevens wrote a ninety-page dissent warning that the majority opinion rigs the political process to advantage rich corporations at the expense of individual voters.¹¹

For this reason, *Citizens United* provoked intense controversy.¹² Scholars across the political spectrum have criticized the decision, asserting that concentrated economic power corrupts and compromises democratic values.¹³ The decision undermined public trust in the

7. 558 U.S. 310 (2010).

8. *Id.* at 342.

9. 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

10. *Citizens United*, 558 U.S. at 365.

11. *Id.* at 396 (Stevens, J., dissenting) (“The Court’s ruling threatens to undermine the integrity of elected institutions across the Nation.”); *id.* at 479 (“In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority’s rejection of this principle ‘elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.’ At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.” (alteration in original) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.13 (1978) (White, J., dissenting))).

12. See David Cole, *How to Reverse Citizens United: What Campaign-Finance Reformers Can Learn from the NRA*, ATLANTIC, Apr. 2016, at 13, 13 (“Few Supreme Court opinions have been as controversial as *Citizens United v. Federal Election Commission*, the 2010 decision that struck down limits on corporations’ campaign expenditures, finding them to be an abridgment of free speech.”).

13. Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 494 (2015) (agreeing with the *Citizens United* result but describing the analysis as “naïve, unrealistic economic libertarianism and blindness to political corruption”); Richard Posner, *Unlimited Campaign Spending—A Good Thing?*, BECKER-POSNER BLOG (Apr. 8, 2012, 9:30 PM), <http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spending-a-good-thing-posner.html> [<https://perma.cc/26ED-9LBR>] (“It thus is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint.”).

integrity and transparency of politics in America.¹⁴ Public opposition to the decision has given birth to nonprofits dedicated to freeing electoral politics from “dark” corporate money.¹⁵

For entrepreneurial trademark owners, the mistrust generated by *Citizens United* may have a silver lining. It created an opportunity for innovative brand owners to buck the feared influence of “dark money”¹⁶ by speaking openly about politics. To succeed in a competitive environment, corporate names and symbols must inspire trust. Trademarks are the vehicles for such expression. They are protected through the Lanham Act, which provides legal protections for the connection between a mark and its source.¹⁷ When a distinctive trademark becomes famous,¹⁸ the Lanham Act rewards its owner by

14. See Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERGPOLITICS (Sept. 28, 2015, 5:00 AM), <https://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot> [<https://perma.cc/NLG6-NJDD>].

15. See *Citizens United Against Citizens United: Fighting the Corporate Takeover of Our Democracy*, CITIZENS UNITED AGAINST CITIZENS UNITED, www.citizensunitedagainstcitizensunited.org/ [<https://perma.cc/K554-YAPS>] (“We are defending the free speech of real people, not distorting the First Amendment so that non-persons like ExxonMobil, Pfizer and Goldman Sachs can grow even more powerful. We believe that elections should be guided by the principle of one person, one vote, not subjugated to the influence of billions of corporate advertising dollars. We are actual citizens united, not a deceptively named front group for corporate greed.”); *Republicans Calling for a Constitutional Amendment to Overturn Citizens United*, ACROSS AISLE, <https://acrosstheaisle.us/republicans-calling-for-a-constitutional-amendment-to-overturn-citizens-united/> [<https://perma.cc/AX3C-QZL5>] (listing 137 Republicans who have called for a constitutional amendment to overturn *Citizens United*); *Who Is End Citizens United? About Us*, END CITIZENS UNITED, <http://endcitizensunited.org/about/> [<https://perma.cc/CR5V-KK8R>] (“Established March 1st, 2015, End Citizens United is a Political Action Committee funded by grassroots donors. We are dedicated to countering the disastrous effects of *Citizens United* and reforming our campaign finance system. We’ll show elected officials, candidates, voters, and the press that the grassroots are fighting back with force against the increasing brazenness of billionaires trying to buy our elections. This will be key to building a broad coalition working towards campaign finance reform and pressuring lawmakers to take action.”).

16. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 468 (2010) (Stevens, J., concurring) (“[S]ome corporations have affirmatively urged Congress to place limits on their electioneering communications. These corporations fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded.”); see *infra* notes 81–100 and accompanying text.

17. 15 U.S.C. § 1125(c)(1) (2012); *id.* § 1127 (“The term ‘trademark’ includes any word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”).

18. *Id.* § 1125(c)(2). The Lanham Act defines fame for purposes of the dilution statute as follows: “a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” *Id.*

protecting the connection between the mark and core brand values.¹⁹ By curating trademarks as symbols with specific meaning, successful brands can attract loyal communities and become catalysts for cultural and legal reform.

This Essay proposes that trademarks can be effective entrepreneurial tools in disrupting political entrenchment. Part I begins with the assertion that brand communities coalesce around more than mere loyalty to a product. Instead—like governments—they can be built on a foundation of core values. Part II demonstrates that in volatile political times brand owners may be faced with the choice of political engagement. Opting out of politics may be especially attractive in such an environment. Trademarks depend on consumer loyalty. Enormous expenditures of time, money, and creative energy are invested in cultivating consumers and engaging them in brand communities. Political action may cut these ties instantly. For this reason, many brand owners choose to stay above the political fray.

Sometimes the choice is altered by unexpected events. Even vigilantly nonpartisan brand owners may face a day when their marks are hijacked as political symbols. Target became a flash point for gun control.²⁰ Skittles was caught in two racially charged political tragedies—first the murder of Trayvon Martin and then the Syrian refugee crisis.²¹ The Tic Tac brand was thrust into a scandal about sexual harassment in the 2016 presidential campaign.²² In such situations, the risk analysis changes. Expressive action may be necessary to reclaim the mark and reconnect it with brand values. Corporate donations to political candidates, political action committees (“PACs”), or nonprofits are one possibility, but come with their own set of risks, as brand owners cannot control the messages of sponsored politicians.

Consumers also play an active role in prompting brand owners to engage with political issues. When government fails to respond to their values, consumers may try to push brand owners to regulate their private spaces. For example, gun safety advocates who failed to succeed through the legislative process have successfully urged corporations to act in accordance with family-friendly brand values in order to pressure

19. See *id.* § 1125(c)(1) (“[T]he owner of a *famous mark* that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner’s mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the *famous mark*[.]” (emphasis added)).

20. See *infra* notes 131–35 and accompanying text.

21. See *infra* notes 110–19 and accompanying text.

22. See *infra* notes 120–21 and accompanying text.

them to restrict open carry policies in private corporate spaces.²³ Notwithstanding substantial risk, fidelity to expressed values may inspire trademark owners to take a stand.

Part III explores options for brand owners who choose to use their marks as change agents. Through express messaging, advertisements, or political boycotts, brand managers can revitalize the values associated with their marks by linking them to resonant cultural or political themes. Alternatively, they may adopt a more targeted strategy, by opposing specific government action. For example, after North Carolina enacted HB2, which eliminated civil rights protections, a long list of firms, artists, sports organizations, and governments joined in protesting the legislation and boycotting the state.²⁴ Through this action, these trademark owners affirmed their commitment to equality in opposition to the values reflected by the North Carolina General Assembly.²⁵

All of these methods provide a stark theater for highlighting brand values in contrast to those reflected in state or federal government action. The Essay concludes with the prediction that entrepreneurial brand owners will find it effective to use political and cultural norms as creative backdrops for defining brand values.

I. BOTH GOVERNMENTS AND BRANDS CREATE COMMUNITIES AROUND CORE VALUES

From the time of the Greek philosophers, law has been described as a rhetorical device for unifying citizens around core beliefs.²⁶ Professor James Boyd White encouraged scholars to think of law as a value-laden persuasive rhetoric.²⁷ Instead of thinking of law as a machine acting on its subjects or an institutionally driven set of pulleys, White theorized

23. See, e.g., Clare O'Connor, *Panera Bread CEO: Don't Bring Your Guns Into Our Restaurants*, FORBES (Sept. 8, 2014, 4:41 PM), <https://www.forbes.com/sites/clareoconnor/2014/09/08/panera-bread-ceo-dont-bring-your-guns-into-our-restaurants/#7c958c2e29ba> [https://perma.cc/68KJ-AJSW]; Doug Stanglin, *Chipotle Asks Customers Not to Bring Guns to its Stores*, USA TODAY (May 20, 2014), <http://www.usatoday.com/story/money/business/2014/05/20/chipotle-arms-guns-carry-demonstrations/9317569/> [https://perma.cc/Y9V6-5GQE]; Gail Sullivan, *Target Announces But Won't Enforce Gun Ban*, Wash. Post (July 3, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/07/03/target-announces-but-wont-enforce-gun-ban/?utm_term=.ba6f771661fd [https://perma.cc/HD4T-6APE].

24. See *infra* notes 183–213 and accompanying text.

25. See *infra* notes 183–213 and accompanying text.

26. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684–85 (1985) (“The ancient rhetorician Gorgias (in Plato’s dialogue of that name) defined rhetoric as the art of persuading the people about matters of justice and injustice in the public places of the state” (citing PLATO, GORGIAS 452e, 454b)).

27. *Id.* at 688–92.

law as an activity reflecting the cultures, languages, and values of its actors.²⁸ He described the work of lawyers as a creative process of persuasion analogous to advertising.²⁹ When lawyers use these tools, they wear the mantle of a particular set of values.³⁰ To White, a lawyer's work is to press for answers to questions about community ethics.³¹

The founding fathers had a specific ethical vision about power, and they created the United States Constitution with unprecedented written limits on government powers³² and assurances of individual rights.³³ From an entrepreneurial perspective, the Constitution is the quintessential mission statement. It sets forth the foundational values at the heart of the American legal system. Some of these values, such as freedom of expression and separation of church and state, are diametrically opposed to the values of many other nations.³⁴ To preserve these core principles, the Constitution was designed to be difficult to change.³⁵ It seems that the founders believed in the novel idea of dispersing power across individual leaders who would come and go so that the government's core principles would generally remain stable and could not be compromised by a powerful few.³⁶

The tension between dedication to specific values and the need to evolve with changing cultural and political realities confronts both governments and brand owners.³⁷ Knowing that public preferences would evolve over time, multiple options for permitting incremental

28. *See id.* at 686–91.

29. *See id.* at 687.

30. *See id.* at 690.

31. *See id.* at 689–90.

32. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3.

33. *See, e.g., id.* amend. I.

34. *See, e.g.*, LA CONST., Jul. 30, 2011, titre I [tit. I], art. 3 (Morocco) (“Islam is the religion of the state . . .” (translated in English)); *see also Exploring Rights Around the World*, NAT'L CONST. CTR., <http://constitutionalrights.constitutioncenter.org/app/home/world> [<https://perma.cc/M4LZ-ZARR>]; Jacob Poushter & Dionna Givens, *Where the World Sees Limits to Free Speech*, PEW RES. CTR. (Nov. 18, 2015), <http://www.pewresearch.org/fact-tank/2015/11/18/where-the-world-sees-limits-to-free-speech/> [<https://perma.cc/DQU7-4KY3>]; Angelina E. Theodorou, *In 30 Countries, Heads of State Must Belong to a Certain Religion*, PEW RES. CTR. (July 22, 2014), <http://www.pewresearch.org/fact-tank/2014/07/22/in-30-countries-heads-of-state-must-belong-to-a-certain-religion/> [<https://perma.cc/2LQR-WYVM>] (“[Thirty] of the world's countries . . . call for their heads of state to have a particular religious affiliation.”); *2016 World Press Freedom Index*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/ranking> [<https://perma.cc/W57H-PYZK>] (showing 18 out of 180 countries as ranked “very bad” for press freedom).

35. *See* U.S. CONST. art. V; THE FEDERALIST NO. 49 (James Madison).

36. *See* THE FEDERALIST NO. 37 (James Madison).

37. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 1–3 (2010); Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 4–6 (2003).

change were built into the system. Thomas Jefferson wrote that the possibility of change in a political system “nourishes a general attention to the public affairs.”³⁸ He believed that the revolutionary spirit favoring change was healthy, and should not be so harshly punished as to discourage free expression and disruptive acts in the future.³⁹ Jefferson famously wrote that “a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical.”⁴⁰ But though change would be possible, it would not be easy. Federal laws were intentionally designed to be difficult to enact, requiring a convergence of diverse geographic and political agreement.⁴¹

Within this structure, each individual state has freedom to experiment in areas not regulated by the federal government. An array of legislative choices taken by different states evidence geographic diversity in the values that motivate state law. Some states permit unions.⁴² Others restrict them.⁴³ While some states increase investments in public education, others choose to limit the role of government in education, and provide fewer resources to public schools.⁴⁴ All of these choices about how political leaders spend taxpayer money reflect important value judgments. Justice Brandeis promoted the theory that state governments function like incubators, permitting experimentation with different visions.⁴⁵ Consumers and companies considering

38. Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 93 (Julian P. Boyd, ed., 1955), <https://founders.archives.gov/documents/Jefferson/01-11-02-0095> [<https://perma.cc/LW7K-VY2M>].

39. *Id.*

40. *Id.*

41. U.S. CONST. art. I, § 7, cl. 2–3; THE FEDERALIST NO. 49 (James Madison).

42. See, e.g., N.Y. LAB. LAW § 703 (McKinney 2015); 28 R.I. GEN. LAWS ANN. § 28-7-12 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.); see also *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/right-to-work-states/> [<https://perma.cc/9G7R-WGPO>].

43. See, e.g., N.C. GEN. STAT. § 95-98 (2015) (providing that union contracts with units of government are illegal); TEX. GOV’T CODE ANN. § 617.002 (West 2012); see also *State Right to Work Timeline*, NAT’L RIGHT TO WORK COMMITTEE, <https://nrtwc.org/facts-issues/state-right-to-work-timeline-2016/> [<https://perma.cc/L5LA-4LKL>].

44. See *Total State K-12 Funding Below 2008 Levels in Most States*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/total-state-funding-below-2008-levels-in-most-states> [<https://perma.cc/435T-Q389>].

45. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”); JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 56 (2016) (“Brandeis concluded with an idea that he would later develop on the Supreme Court—the idea of giving the states wide latitude to experiment as ‘laboratories of democracy.’”). Brandeis wrote,

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic

relocation may take all of these choices into account when determining which state best aligns with their plans and values.

The idea of building a community on foundational values is a feature that brand communities share with governments. Both organize around a specific set of ideas, and in opposition to others. Both make promises to a public audience and lead them to expect conformity with articulated values. Like voters, brand communities may shift their loyalty.⁴⁶ Like political leaders, brand owners must succeed in maintaining shared values with their consumer community (even when their products or service change) to be sustainable.

Trademarks are the dynamic rhetorical symbols at the heart of brand communities.⁴⁷ When a mark stands out among the competition because of the meaningful values associated with it, it may attract consumers with similar beliefs, and if well curated, may keep them connected.⁴⁸ The values embodied in the brand (and often articulated in an organization's mission statement) are often the ideas that inspire innovation, justify decision making, and describe corporate culture and aspirations.⁴⁹ To attract and keep a consumer community, brand values should inspire action from brand leadership if the corporation is to be

experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Liebmann, 285 U.S. at 311 (citation omitted).

46. See Deborah Gerhardt, *Consumer Investment in Trademark*, 88 N.C. L. REV. 427, 450–51 (2010).

47. Courts have referred to trademarks and brands as synonyms. See Devin R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 985 & n.15 (2012) (citing *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1994); *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002)). However, this Essay draws a distinction. The term “trademarks and marks” shall refer to symbols protected by the Lanham Act. The term “brand” shall refer to the broader notion of these symbols as connected to specific core values. Even without meaningful values, a trademark may still differentiate a product or service from its competition. When such a mark becomes a brand that stands for particular values, it may be employed in the service of entrepreneurial messaging against a contrasting political backdrop.

48. See Gerhardt, *supra* note 46, at 465–67; Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491, 1505–06 (2012).

49. See, e.g., Scott Jeffrey, *The Ultimate Business Course in Core Values*, CULT BRANDING CO. (Apr. 23, 2014), <http://cultbranding.com/ceo/core-values/> [<https://perma.cc/Q6CG-72Q7>] (“Core values are part of a company’s DNA. They define what an organization stands for, highlighting an expected and ultimate set of behaviors and skills. A company’s values lie at the core of its culture. Values are fundamental, enduring, and actionable.”).

seen as authentically committed to its mission.⁵⁰ Careful attention to the connection between values and marks can create powerful expressive resonance. Some of the most successful trademarks symbolize specific and enduring core values.⁵¹ For example, Apple is known for bold creativity.⁵² Nike stands for empowering the athlete in all of us.⁵³ Ivory soap is pure.⁵⁴ Coca-Cola is “The Pause that Refreshes[.]” quenching our search for happiness.⁵⁵

The trick is to maintain these themes in a way that does not become stale. Brands, like governments, must adapt to changing times and public preferences. Behavioral management research affirms that both specific value propositions and adaptability of corporate culture stimulate innovation.⁵⁶ One study examining this question in the high technology industry found that organizations committed to adaptability and building consensus performed better than their peers who were less committed to these values.⁵⁷

Through innovation in community building, brand managers may reach for politically or culturally salient issues to refresh an established brand. For example, Proctor & Gamble’s “Like a Girl” campaign transformed its “Always” mark into a symbol of female self-

50. *Id.*

51. See, e.g., DOUGLAS B. HOLT, *HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING* 1 (2004) (Arguing that a brand becomes an icon when it serves as a “representative symbol, especially of a culture or a movement”).

52. Gráinne M. Fitzsimmons, Tanya L. Chartrand & Gavan J. Fitzsimmons, *Automatic Effects of Brand Exposure on Motivated Behavior: How Apple Makes You “Think Different”*, 35 J. CONSUMER RES. 21, 24 (2008) (“Apple has labored to cultivate a strong brand personality based on the ideas of nonconformity, innovation, and creativity.”); see Claire Falloon, *Leading Brands Wield Words to Thrive*, INTERBRAND, <http://interbrand.com/views/leading-brands-wield-words-to-thrive/> [https://perma.cc/456C-6SCK].

53. See Paula Andrus, *Secrets of the 10 Most-Trusted Brands*, ENTREPRENEUR (Mar. 20, 2012), <https://www.entrepreneur.com/article/223125> [https://perma.cc/26DL-ZQ9W]; *Unleash Human Potential*, NIKE, <http://about.nike.com/pages/people> [https://perma.cc/B4RP-XKF8] (stating Nike’s mission to “bring inspiration and innovation to every athlete in the world”).

54. See Jane L. Levere, *Ivory Soap Uses a Bar That Sinks, a \$250,000 Contest and Old-Style Packaging to Increase Sales*, N.Y. TIMES (Oct. 25, 2001), <http://www.nytimes.com/2001/10/25/business/media-business-advertising-ivory-soap-uses-bar-that-sinks-250000-contest-old.html> [https://perma.cc/895E-G9SJ]; *Soap Products*, ADVERT. AGE (Sept. 15, 2003), <http://adage.com/article/adage-encyclopedia/soap-products/98884/> [https://perma.cc/YEM4-79H5].

55. See *A History of Coca-Cola Advertising Slogans*, COCA-COLA JOURNEY (Jan. 1, 2012), <http://coca-colacompany.com/stories/coke-lore-slogans> [https://perma.cc/s9AM-GGDD].

56. See Jennifer A. Chatman et al., *Parsing Organizational Culture: How the Norm for Adaptability Influences the Relationship Between Culture Consensus and Financial Performance in High-Technology Firms*, 35 J. ORGANIZATIONAL BEHAV. 747, 785–808 (2014).

57. *Id.* at 785.

confidence.⁵⁸ The campaign was launched in response to research showing that girls lose self-esteem after they begin menstruating.⁵⁹ The “Like a Girl” advertisement was a short documentary film in which pre-adolescent girls, one of their brothers, and some young adults were asked to run and throw “like a girl.”⁶⁰ The young girls responded with strength and purpose, but everyone else acted weak, mocking, and ineffective.⁶¹ When confronted with the girls’ reactions compared to theirs, the young adults and the brother saw the phrase “run like a girl” in a new light.⁶² This ad seized a term with multiple meanings, prompted reflection about gender stereotypes, and linked the “Always” brand to female empowerment. The ad was entrepreneurial not only for its creative execution and message, but also for touting a value that was not linked to a particular product feature. The full financial impact of this ongoing campaign is not yet apparent, but in the shorter term, its impact has been measurable. Industry observers reported that “Always’ brand equity showed a strong double digit percentage increase during the course of the campaign while most of its competitors saw slight declines.”⁶³

With respect to visibility, the ad was a phenomenal success. The “Like A Girl” film has been viewed over 63 million times on YouTube alone, resulting in far greater exposure than the paid spot that ran during the Super Bowl.⁶⁴ The ad also had a meaningful impact on gender perceptions. Before watching the film, 19% of teens and young adults had a positive association with the phrase “like a girl[.]”⁶⁵ After watching it, “76% said they no longer saw the phrase negatively.”⁶⁶

Sales blogger Patricia Weber describes foundational brand values in a way that is consistent with the “Always” example. She states that these core principles are

58. See Hannah Goldberg, *This Ad Completely Redefines the Phrase “Like a Girl”*, TIME (June 26, 2014), <http://time.com/2927761/likeagirl-always-female-empowerment/> [https://perma.cc/CD9L-W4SK].

59. See *#LikeAGirl: How It All Started*, ALWAYS, <http://always.com/en-us/about-us/likeagirl-how-it-all-started> [https://perma.cc/2PAZ-Y6MS].

60. Always, *Always #LikeAGirl*, YOUTUBE (June 26, 2014), <https://www.youtube.com/watch?v=XjJBjWYDTs>.

61. *Id.*

62. *Id.*

63. *Case Study, Always #LikeAGirl*, D&AD, <https://www.dandad.org/en/d-ad-always-like-a-girl-campaign-case-study-insights/> [https://perma.cc/V29J-X7PU].

64. *Id.*; David Aaker, *How “Like A Girl” & “Real Beauty” Deliver Business Impact*, PROPHET, <https://www.prophet.com/thinking/2015/05/230-how-like-a-girl-real-beauty-deliver-business-impact/> [https://perma.cc/5HYD-L7NT].

65. *Case Study, Always #LikeAGirl*, *supra* note 63.

66. *Id.*

the ideas, associations, social positioning, values and morals that a company tries to project towards its customers. It doesn't matter what the company is selling[;] the values are at the forefront of brand image. Whilst this is not always explicit in many ways it still forms a core concept or foundation of the marketing strategies employed.⁶⁷

Weber cites the affirmative “Red Bull gives you wings” branding as an illustrative example.⁶⁸ Through this theme, Red Bull has become a brand that affirms physical and intellectual energy, and therefore, can help us become better versions of ourselves.⁶⁹ In addition to providing individual validation, brands, like religious institutions, can provide social affirmation by providing opportunities to share values through a community.

Social media makes it easy for communities to coalesce around meaningful themes.⁷⁰ Virtual groups defy time and geography so that members may find each other through the connective force of the brand to share experiences.⁷¹ The inherent risk in social media communities is that the brand owner may lose control of the conversation.⁷² That risk is unavoidable, but through thoughtful curation of a brand's core values, and reacting or leading consistently with them, mark owners may increase their relevance and succeed in catalyzing reforms.

Like governments, brands may be created around socially progressive values. Blake Mycoskie's charitable mission was the reason he created the TOMS company.⁷³ “TOMS” is an abbreviation for “Tomorrow's Shoes.”⁷⁴ For every pair the company sells, it gives a pair to a child in need.⁷⁵ The company's identity is inextricably linked to this charitable promise. Mycoskie has been tremendously successful—at both creating a for-profit company and fulfilling his charitable missions.⁷⁶ His entrepreneurial idea of using purchases instead of donations to do charitable work has inspired an entire business sector of

67. See Patricia Weber, *Case Study in Core Values in Brand Marketing*, PATRICIA WEBER (June 4, 2012), <http://patricia-weber.com/case-study-in-core-values-in-brand-marketing/> [<https://perma.cc/Y4E2-Z2HA>].

68. See *id.*

69. *Id.*

70. Gerhardt, *supra* note 48, at 1505–06.

71. *Id.*

72. *Id.* at 1510.

73. See BLAKE MYCOSKIE, *START SOMETHING THAT MATTERS* 6 (2011).

74. Blake Mycoskie, *How I Did It: The TOMS Story*, ENTREPRENEUR (Sept. 20, 2011), <https://www.entrepreneur.com/article/220350> [<https://perma.cc/3TZN-HG83>].

75. *About TOMS: TOMS Company Overview*, TOMS, <http://www.toms.com/about-toms-companyInfo> [<https://perma.cc/N8XP-ZM6R>].

76. See MYCOSKIE, *supra* note 73, at 156.

for-profit social action.⁷⁷ Mycoskie has said that his success—and that of others who followed his business model—taught him that “giving is good business—in both senses of the word ‘good.’ It’s good because it helps people; it’s good because it makes money.”⁷⁸ He describes this business model of “conscious capitalism” as

more than simply making money—although it’s about that too. It’s about creating a successful business that also connects supporters to something that matters to them and that has great impact in the world. As consumers, customers will want your product for the typical reasons—because it works better, because it’s fashionable, because the price is competitive, because it offers an innovation—but as supporters they also believe in what you’re doing; they’ve bought into your story because it taps in something real, and they want to be a part of it.⁷⁹

The process of community building around specific values is an innovative space that opens a powerful path to brand success. Not all brands were conceived, like TOMS, around a socially resonant value. Once a community is built, the trademark owner has the opportunity to steer the brand as circumstances change. Proctor and Gamble’s “Like a Girl” campaign shows how a brand may be reinvigorated as a cultural change agent. If a brand does not succeed in the essential task of staying relevant to a community, the business associated with it will likely fail. Consumer attention has enormous economic value.⁸⁰ To be heard through the incessant advertising clutter, trademark owners must repeatedly evaluate whether their next step will be to disengage from politics or advocate for reform. Part II focuses on this choice.

II. NAVIGATING THE CHOICE TO LINK A TRADEMARK WITH POLITICS

In tumultuous political moments, brand managers may do all they can to steer clear of politics. Evoking transcendent themes that will remain stable notwithstanding volatile political trends may be

77. Shana Lebowitz, *On the 10th Anniversary of TOMS, its Founder Talks Stepping Down, Bringing Private Equity, and Why Giving Away Shoes Provides a Competitive Advantage*, BUS. INSIDER (June 15, 2016, 10:00 AM), <http://www.businessinsider.com/toms-blake-mycoskie-talks-growing-a-business-while-balancing-profit-with-purpose-2016-6> [https://perma.cc/2V6N-YTZG]; Christopher Marquis & Andrew Park, *Inside the Buy-One-Give-One Model*, STANFORD SOC. INNOVATION REV., Winter 2014, at 28, 28.

78. See MYCOSKIE, *supra* note 73, at 156.

79. *Id.* at 32.

80. See generally TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016) (arguing that many American businesses depend on the ability to attract consumer attention).

comforting to consumers who crave something solid, dependable, and enduring. Political engagement may have no value if neither side of an issue is sufficiently aligned with brand values so that engagement is worth sacrificing ties with some consumers. Yet complete separation from politics may cause brand owners to lose opportunities to participate in legal policy discussions. For a trademark to succeed as a change agent, it must be identified with specific values that stand in opposition to others. Mark owners can achieve this goal by contrasting superior value clarity with social dysfunction or aligning brand values with a particular political point of view. An array of expressive options for engagement may be considered.

A. Risks Inherent to Political Engagement

Supporting like-minded candidates or organizations is one choice that may appear safer than direct advocacy. Some business advisers warn that such gifts are too risky.⁸¹ Donating money to nonprofits, candidates, or PACs can backfire if the recipient acts in ways that undermine corporate values. For example, Natural Foods experienced unexpected reputational harm when it donated to a “pro-business” candidate who later took a stand against gay rights.⁸² In order to preserve the integrity of brand values, firms may choose to support the values themselves in order to align a mark with politically salient ideals but minimize the risk of being associated with the less predictable stances of a particular political candidate or party.

Some firms craft mission statements containing code words to signal a specific political orientation. Such subtler messaging may not be apparent to consumers with a low level of political engagement. For example, the brand mantras for Amway and Lululemon are not explicitly political, but they signal their founders’ strong libertarian values. Both quote touchstones of Ayn Rand’s objectivism. The Amway mission statement touts “personal responsibility” and “free enterprise” among its core values.⁸³ The high-end yoga apparel company, Lululemon, promotes a vision of “elevat[ing] the world from mediocrity to greatness.”⁸⁴ Lululemon experimented with bolder objectivist symbolism by printing shopping bags with the question, “Who is John

81. See, e.g., Brian K. Richter, *Case Study: Do Business and Politics Mix?*, HARV. BUS. REV., Nov. 2014, at 133, 133.

82. *Id.*

83. *Vision and Values*, AMWAY, <http://www.amway.com/about-amway/our-company/heritage/vision-and-values> [https://perma.cc/9WSK-C5HK].

84. *Strategic Sales*, LULULEMON, <http://info.lululemon.com/about/strategic-sales> [https://perma.cc/V5BC-J2PB].

Galt?”⁸⁵ This question is the first line of Rand’s *Atlas Shrugged*.⁸⁶ In its blog, the company explained how Rand’s vision is consistent with the company’s value of stimulating its consumer community to be the best and most creative versions of themselves.⁸⁷

Given the risks of offending consumers with a different political perspective, many trademark owners may choose to keep the brand as far away from politics as possible.⁸⁸ As Laurence Tribe observed,

[L]arge businesses—and for-profit corporations generally—have a strong interest in not alienating large swaths of their customers or clients with controversial forms of political influence, such as donating directly to social and political causes that some of those constituent groups may not support and might indeed actively oppose (consider Target’s controversial 2010 donation to a group opposing same-sex marriage).⁸⁹

Any action is fraught with risk.

Withdrawing charitable support may also harm a brand. In an attempt to show that its mission of curing cancer is bipartisan, the Susan G. Komen foundation withdrew its support from Planned Parenthood.⁹⁰ The following year, its income decreased by twenty-two percent, and notwithstanding the economic downturn of the time period, Komen leadership attributed the “sharp decline to the Planned Parenthood controversy.”⁹¹ Years later, the organization was still recovering and hoping “that time is erasing the black mark left by its foray into abortion politics.”⁹² When a trademark owner loses control of the values associated with a brand, recapturing the story can be a difficult and expensive task.⁹³ For this reason, donations and other forms of political engagement pose serious risks to brand meaning. Choosing not to donate or speak out is one way to protect the clarity and consistency of brand values.

Given the risks associated with public political support, anonymous political strategies may be deemed preferable if a firm seeks to

85. Alexis, *Who Is John Galt?*, LULULEMON BLOG (Nov. 2, 2011, 10:22 AM), <http://static.lululemon.com/community/blog/who-is-john-galt/> [https://perma.cc/UT28-PVRK].

86. AYN RAND, *ATLAS SHRUGGED* 3 (1957).

87. Alexis, *supra* note 85.

88. Tribe, *supra* note 13, at 472.

89. *Id.*

90. Michael Hiltzik, *Susan G. Komen Foundation Discovers the Price of Playing Politics*, L.A. TIMES (Jan. 8, 2014, 1:25 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-susan-g-komen-20140108-story.html> [https://perma.cc/6YCX-HVP4].

91. *Id.*

92. *Id.*

93. See Gerhardt, *supra* note 48, at 1524–25 (2012).

nonpublicly support a candidate. Campaign finance laws require disclosure of all direct donations to political candidates.⁹⁴ However, currently, politically active nonprofits are not required by law to disclose their donors.⁹⁵ “Dark money” describes gifts to nonprofits that are organized to avoid disclosing their donors’ identities.⁹⁶ Spending by these nonprofits amounted to approximately \$5 million in the 2006 political campaigns, and increased to well over \$180 million in the 2016 presidential race.⁹⁷ Individuals and corporations may donate to these nonprofits who can send the donation to politicians without revealing the original donor’s identity.⁹⁸ In this way, these nonprofits can be used to avoid campaign finance spending limits. The fear of corporate dark money and the distrust it sows creates a backdrop against which brands may surprise and delight consumers by speaking transparently about their support of public issues.

The foregoing examples contribute to an understanding of why dark money donations are appealing. They are a safe way of engaging in political support without drawing consumer attention to partisan preferences and irreparably tarnishing brand meaning. Any direct engagement with political actors—even in an advisory role—may affect a company’s value and relationship with its customers in ways that are difficult to predict. Disengagement may appear to be the most prudent option in volatile political moments. Wells Fargo, UPS, Motorola, JPMorgan, and Ford all withdrew sponsorship of the 2016 Republican National Convention when it became clear that Donald Trump was the presumptive nominee.⁹⁹ They seemingly did so to distance themselves from Trump in particular, as all were sponsors of the 2012 Republican convention.¹⁰⁰

94. See 52 U.S.C. § 30104(b)(3)(A) (2012); *Contribution Limits 2013–14*, FED. ELECTION COMM’N, <http://www.fec.gov/pages/brochures/contriblimits.shtml> [https://perma.cc/A4Y7-99BX].

95. 26 U.S.C. § 6104(b), (d)(3)(A) (2012); see *Political Nonprofits (Dark Money)*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_summ.php [https://perma.cc/NQW6-WWJ3] (last updated Mar. 26, 2017).

96. Michael Beckel, *What Is Political ‘Dark Money’—and Is It Bad?*, CTR. FOR PUB. INTEGRITY (Jan. 20, 2016, 11:33 AM), <https://www.publicintegrity.org/2016/01/20/19156/what-political-dark-money-and-it-bad> [https://perma.cc/U9V6-HUVA].

97. *Outside Spending: Total by Type of Spender, 2016*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/fes_summ.php [https://perma.cc/YZ6W-SAY8].

98. § 6104(b), (d)(3)(A).

99. Ben Geier, *More Companies Are Pulling Money Out of Trump’s Republican Convention*, FORTUNE (June 17, 2016), <http://fortune.com/2016/06/17/rnc-trump-companies/> [http://perma.cc/WXS8-8U79].

100. See *id.*

B. Political Hijacking

Unanticipated political events may require brand owners to rethink their political brand strategy. After President Trump was elected, over 100 chief executives clamored to join his Strategy and Policy Forum.¹⁰¹ Because all companies have substantial financial interests affected by legislative and executive action, many wanted a seat at President Trump's policy table.¹⁰² Travis Kalanick, the CEO of Uber, was one of the elite group that made the final cut.¹⁰³ Jeffrey A. Sonnefeld of the Yale School of Management spoke with more than half of the participants in the policy forum, and reported that the opportunity to inform the administration about the business climate was genuine: "[The participants are] telling me they found him very receptive to their ideas and willing to listen They've said they're holding each other accountable to be truthful and candid and to raise key issues with him."¹⁰⁴

When Trump issued a controversial immigration ban, Uber users held the company accountable for the order, even though its CEO had done nothing more than participate in the policy forum.¹⁰⁵ Within four days, 200,000 people deleted the Uber mobile app, and Lyft (a leading Uber competitor) reported that downloads of its app had doubled.¹⁰⁶ Uber ultimately decided that the opportunity to influence policy was not worth losing control of its brand.¹⁰⁷ In a memo to Uber employees, Kalanick wrote that the "assumption that Uber (or I) was somehow endorsing the administration's agenda has created a perception-reality gap between who people think we are, and who we actually are[.]"¹⁰⁸ Disengagement was deemed necessary to reclaim Uber's identity.¹⁰⁹

Choices about political engagement may change if a mark is hijacked by unexpected events. When Skittles candy became a protest symbol in response to the murder of Trayvon Martin, its parent company, Wm. Wrigley, found itself in a tough spot.¹¹⁰ The Skittles mark had

101. James B. Stewart, *Risky Business for C.E.O.s: An Invitation from Trump*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/business/trump-ceo-invitations.html?_r=0 [https://perma.cc/HJ9K-KCGW].

102. *See id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. Gini Dietrich, *Trayvon Scandal Puts Chicago Candy Giant in Uncomfortable PR Spotlight*, CRAIN'S (Apr. 6, 2012), <http://www.chicagobusiness.com/article/20120406/BLOGS06>

been carefully curated over the years to express wit and fun, and was suddenly thrust into the tragedy of a racially motivated killing.¹¹¹ When the spotlight on the brand resulted in increased sales, Wrigley risked being criticized for profiting from a child's tragic death.¹¹² In an attempt to distance its Skittles mark from the controversy, Wrigley issued the following statement:

We are deeply saddened by the news of Trayvon Martin's death and express our sincere condolences to his family and friends. We also respect their privacy and feel it inappropriate to get involved or comment further as we would never wish for our actions to be perceived as an attempt of commercial gain following this tragedy.¹¹³

Wrigley could have made a bold entrepreneurial choice to act as a cultural leader by speaking against racial stereotypes that led to the death of a child armed only with Skittles.¹¹⁴ Instead, Wrigley chose political disengagement—making no allusion to the racial dynamics surrounding Trayvon Martin's death. It declined a role it could have seized as a change agent and gave its reason for doing so: it did not seek to profit from the tragedy. It might have offered to donate some portion of profits to nonprofits or candidates devoted to racial equality. Instead, it stepped away from the political moment.

Within two years of Trayvon Martin's death, Wrigley again had to rescue its Skittles brand from political controversy. This time, Wrigley made a different choice. On September 19, 2016, Donald Trump, Jr. tweeted an image of Skittles candy with the following note: "If I had a bowl of skittles and I told you just three would kill you. Would you take a handful?"¹¹⁵

/120409840/trayvon-scandal-puts-chicago-candy-giant-in-uncomfortable-pr-spotlight [https://perma.cc/4CS7-MWNU].

111. See, e.g., *Skittles*, WRIGLEY, <http://www.wrigley.com/global/brands/skittles.aspx> [https://perma.cc/U7ZP-RQMH].

112. Dietrich, *supra* note 110.

113. Nadine Deninno, *Trayvon Martin Case: Skittles, Arizona Iced Tea Speak Out About 'Commercial Gain' in Death of Florida Teen*, INT'L BUS. TIMES (Mar. 27, 2012, 11:30 AM), <http://www.ibtimes.com/trayvon-martin-case-skittles-arizona-iced-tea-speak-out-about-commercial-gain-death-florida-teen> [https://perma.cc/5WNR-KMD5].

114. See Leo Benedictus, *How Skittles Became a Symbol of Trayvon Martin's Innocence*, GUARDIAN (July 15, 2013), <https://www.theguardian.com/world/shortcuts/2013/jul/15/skittles-trayvon-martin-zimmerman-acquittal> [https://perma.cc/ACU9-XSH2].

115. Donald Trump Jr. (@DonaldJTrumpJr), TWITTER (Sept. 19, 2016, 6:41 PM), <https://twitter.com/DonaldJTrumpJr/status/778016283342307328> [https://perma.cc/CE88-3FSZ].

Figure 1: Would You Take a Handful?¹¹⁶

Instantaneously, Wrigley was again thrust into a racially charged political debate, this time over the fate of Syrian refugees. Adweek described how difficult this situation can be for a creative team:

[J]ust a few minutes after [Trump, Jr.'s tweet] . . . , everyone who works in social media and PR came to the next logical conclusion: "Man, I'm glad I'm not in the Skittles social media department." . . . [N]obody wants their national brand to be dragged into a xenophobic political debate.¹¹⁷

Had Wrigley not distanced itself from the values reflected in the tweet, the meme may have tarnished the brand indefinitely. To avoid that result, a quick, creative, and decisive statement was necessary. Here was another entrepreneurial opportunity fraught with the risk of political engagement, but this time, Wrigley seized it. In response to journalist inquiries, the company emailed: "Skittles are candy; refugees are people. It's an inappropriate analogy. We respectfully refrain from further comment, as that could be misinterpreted as marketing."¹¹⁸ In this way,

116. Donald Trump Jr. (@DonaldJTrumpJr), TWITTER (Sept. 19, 2016, 6:41 PM), <https://web.archive.org/web/20160920003332/https://twitter.com/DonaldJTrumpJr/status/778016283342307328> [<https://perma.cc/4NK5-5S3D/>].

117. Brendon Shank, *How Skittles Crafted the Perfect Response to Donald Trump Jr.*, ADWEEK: PRNEWSEER (Sept. 20, 2016, 12:30 PM), <http://www.adweek.com/prnewser/why-skittles-response-to-donald-trump-jr-was-so-awesome/123686> [<https://perma.cc/54Rx-NMZ8/>].

118. Jena McGregor, *Skittles Can't Seem to Escape Political Controversies*, WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/09/22/skittles-gave-the-perfect-response-to-donald-trump-jr/?utm_term=.f8058c548308 [<https://perma.cc/FN5L-SHML>].

Wrigley was able to detach its brand from Trump, Jr.'s dehumanizing rhetoric while subtly criticizing it. Advertising leaders commended Wrigley for its quick, short, and humane response.¹¹⁹ The response set a new standard for regaining control of brand meaning with an assertive value statement.

Other companies soon followed this model. The Tic Tac brand was pulled into another unsavory moment from the 2016 presidential campaign when Donald Trump bragged about engaging in unwanted sexual advances and said he would eat Tic Tac candy to prepare himself.¹²⁰ To disassociate its brand from Trump's apparent views, Tic Tac USA tweeted: "Tic Tac respects all women. We find the recent statements and behavior completely inappropriate and unacceptable."¹²¹ In these instances corporate strategists risked alienating political leaders and some consumers in order to clarify and maintain the integrity of their brand values.

As the Uber example previously mentioned demonstrates, sometimes this kind of pressure on brand owners can come from their own consumers. Brand managers cannot create meaning without substantial consumer investment of time, loyalty, and money.¹²² If consumers perceive a disconnect between stated values and corporate action (or inaction), they may demand a response or withdraw their investments. In this way, consumers may test brand values by drawing corporate leaders into politics.

Firearms policy is one area where consumers have succeeded in pushing brand owners to one side of the political divide. Weapon policies—such as permitting customers to openly carry guns—are an issue through which brand owners may distinguish or align their values with federal, state, or local laws.¹²³ Support for gun control legislation in the United States has been much stronger than the political realm

119. See Shank, *supra* note 117.

120. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.5f2221d1cf27 [<https://perma.cc/AJ52-TJ9U>].

121. See Tic Tac USA (@TicTacUSA), TWITTER (Oct. 8, 2016, 12:03 PM), <https://twitter.com/tictacusa/status/784831611531436032?lang=en> [<https://perma.cc/HMF8-6DJS>].

122. See Gerhardt, *supra* note 46, at 450–51.

123. See Dahlia Lithwick, *Shopping at Whole Foods in an Open-Carry State*, SLATE (Jan. 21, 2016, 1:07 PM), http://www.slate.com/articles/double_x/doublex/2016/01/how_a_posse_of_moms_got_guns_banned_from_whole_foods.html [<https://perma.cc/F9GB-6F2E>].

suggests.¹²⁴ A 2015 Gallup poll indicated that eighty-six percent of Americans support more gun safety legislation, such as background checks, before a person may buy a firearm.¹²⁵ Despite overwhelming public support for gun-safety legislation, Congress has failed to enact such measures.¹²⁶ Many states continue to permit persons to carry firearms openly in public places.¹²⁷ Over the past decade, the Supreme Court has declared a series of state gun control laws unconstitutional.¹²⁸

When frustrated advocates failed to convince Congress to enact federal gun-safety legislation and saw other gun-safety laws undone by the Supreme Court, they brought the issue directly to private companies who could control at least their public spaces. After the 2012 shooting of twenty children and six educators at Sandy Hook Elementary School, gun control advocacy gained traction in the United States with the formation of Moms Demand Action.¹²⁹ Its site describes the political frustration that motivated its founder:

We are facing a public health crisis: Nearly eight American children are shot and killed every day. Anything else responsible for this many deaths would be immediately investigated and regulated. Not a single federal law has been passed in decades to prevent gun violence—not after Columbine and not after Newtown.

For too long, those who stand to profit from easy access to guns have controlled the conversation about gun violence. American families are being destroyed and mothers have had enough; we will no longer stand by and let Congress, companies and colleges

124. See Delphine d'Amora, *Most Americans Now Support Stricter Gun Control Laws*, MOTHER JONES (Oct. 19, 2015, 11:54 AM), <http://www.motherjones.com/politics/2015/10/most-americans-now-support-stricter-gun-control-laws> [https://perma.cc/GGB2-43KZ].

125. *Guns*, GALLUP (2016), <http://www.gallup.com/poll/1645/guns.aspx> [https://perma.cc/N9JQ-5KGJ].

126. See Mike DeBonis & Paul Kane, *Gun Control Measures Unlikely to Gain Steam in Congress Post-Oregon Shooting*, WASH. POST (Oct. 2, 2015), https://www.washingtonpost.com/politics/little-hope-for-action-as-congress-confronts-another-mass-shooting/2015/10/02/b1752f00-6936-11e5-8325-a42b5a459b1e_story.html [https://perma.cc/LUP7-VFE7].

127. See, e.g., GA. CODE ANN. § 16-11-126(b) (2011); *State v. Kerner*, 181 N.C. 574, 574, 107 S.E. 222, 225 (1921); Rani Molla, *Map: Where Is 'Open Carry' Legal?*, WALL ST. J.: BLOG (Aug. 22, 2014, 4:14 PM), <http://blogs.wsj.com/numbers/map-where-is-open-carry-legal-1715/> [https://perma.cc/T87C-6BH5].

128. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 749–50 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 628–36, 694 (2008) (declaring the Firearms Control Regulations Act of 1975, which banned D.C. residents from owning handguns, unconstitutional).

129. See *About Moms Demand Action for Gun Sense in America*, MOMS DEMAND ACTION, <https://web.archive.org/web/20150316012657/http://momsdemandaction.org/about> [https://perma.cc/L54D-SF42].

turn their back on sensible gun laws and policies. We are organizing to effectively lobby and apply pressure that will result in stronger, sensible gun laws and policies that will protect our children and families. The momentum is with us, and we are in this for the long haul.¹³⁰

While political action remains elusive, Moms Demand Action has succeeded in prompting has change in the private sector. Its strategy is to shine a questioning light on whether espoused brand values align with corporate gun policy.¹³¹ It has repeatedly petitioned corporations to prohibit guns on their premises.¹³² After images circulated of shoppers carrying semi-automatic weapons in Target, Moms Demand Action insisted that the Minneapolis company choose whether this conduct reflected corporate values.¹³³ In response, Target requested that its consumers leave their firearms at home.¹³⁴ Target's CEO defended its decision with an affirmation of values, stating that "[b]ringing firearms to Target creates an environment that is at odds with the family friendly shopping and work experience we strive to create."¹³⁵

Dahlia Lithwick described this "not in my backyard" movement as a test of corporate values and authenticity.¹³⁶ While advocates opposing any gun regulations may be succeeding in the realm of political influence, gun safety advocates have succeeded in influencing brand owners to take a stand on firearms policies. Such action may create a new or deeper bond with some consumers, and lead to severed ties with others.

These examples illustrate the important dynamics in choosing when and how to act when others attempt to define brand meaning. When a business is faced with two opposing sets of consumer values, its corporate values—if authentic—can be the deciding principle. Once a firm chooses to be proactive on a salient cultural or political issue, it

130. *Id.*

131. *Corporate Responsibility*, MOMS DEMAND ACTION, <http://momsdemandaction.org/corporate-responsibility> [<https://perma.cc/H7LV-ZPEE>].

132. *Id.*

133. Press Release, Moms Demand Action, Moms Demand Action Calls on Target Corp. to Prohibit Open Carry of Firearms in Stores (June 4, 2014), <http://momsdemandaction.org/wp-content/uploads/2013/10/MOMS-DEMAND-ACTION-CALLS-ON-TARGET-CORP.-TO-PROHIBIT-OPEN-CARRY-OF-FIREARMS-IN-STORES-.pdf> [<http://perma.cc/P4LC-QLHV>].

134. Ben Brody, *Target to Customers: No Guns Please*, CNN MONEY (July 2, 2014, 3:40 PM), <http://money.cnn.com/2014/07/02/news/companies/guns-target/?iid=EL> [<https://perma.cc/5L4Y-WMJ5>].

135. Target, *Target Addresses Firearms in Stores*, A BULLSEYE VIEW, <https://corporate.target.com/article/2014/07/target-addresses-firearms-in-stores> [<https://perma.cc/L4W4-R7MP>].

136. See Lithwick, *supra* note 123.

faces an array of other strategic decisions. Part III explores different means for leveraging brands as change agents for political action.

III. AFFIRMING BRAND VALUES THROUGH POLITICAL AND CULTURAL ENGAGEMENT

Touting a product feature in opposition to a commercial competitor is what consumers expect to see in advertisements. The expected is not memorable. When an advertisement speaks for or against a political or social norm, it can surprise its audience with authenticity. When done well, it may create a transformative entrepreneurial moment that stimulates the Jeffersonian belief in constructive change.¹³⁷

Advertisements that resonate in this way can become timeless cultural touchstones, especially if they inspire hope regarding a problem that government has failed to solve. For example, Coca-Cola has affirmed its role as an iconic American brand by offering ads showing that a shared experience through a brand connection may resolve a persistent cultural problem. The Coca-Cola Company has unapologetically called attention to racism in American culture and has run aspirational ads reminding us of ways in which the United States can overcome the cultural tensions resulting from this history. In 1971, Coca-Cola's "Hilltop" advertisement featured a multi-racial field of young people singing the words "I'd like to teach the world to sing in perfect harmony."¹³⁸ The campaign evoked associations between drinking Coke and hoping that the world's collective better selves would work together to bring peace to Vietnam.¹³⁹ Coca-Cola's 1979 "Mean Joe Green" advertisement¹⁴⁰ is another example of cultural thought leadership. It powerfully illustrated the human ability to overcome irrational fears of racism.¹⁴¹ By showing a white child's respect for a black athlete and the kindness offered by "Mean" Joe Green in return, the advertisement unforgettably signaled that racism is learned and systemic and can be overcome if society recruits that childlike sense of human connection irrespective of race.¹⁴² By making these creative choices, the Coca-Cola

137. See Letter from Thomas Jefferson to James Madison, *supra* note 38; *supra* note 38 and accompanying text.

138. Project Rebrief, *Coca-Cola, 1971—'Hilltop' | 'I'd Like to buy the world a Coke'* YOUTUBE (Mar. 6, 2012), <https://www.youtube.com/watch?v=1VM2eLhvsSM>.

139. HOLT, *supra* note 51, at 23–24 (discussing how the ad "symbolically heal[ed] acute cultural tensions tearing at American society" following the start of the Vietnam War).

140. stiggerpao, *Coca-Cola Classic Ad: Mean Joe Green [Full Version] (1979)*, YOUTUBE (July 17, 2007), <https://www.youtube.com/watch?v=xffOCZYX6F8>.

141. HOLT, *supra* note 51, at 24–26.

142. See *id.* at 25–26.

Company encouraged its consumers to imagine what is possible when they recruit their better selves to see past racial stereotypes.

Brand owners who choose to risk political engagement will again face an array of options for proceeding. The discussion first turns to action designed to situate the brand as a leading voice on a cultural issue and then will address action targeted at specific legislation.

A. *Cultural Leadership*

Against the black curtain of dark money, express political speech has become an enticing way for creative mark owners to attract the spotlight of public attention. The strategies employed may be intentionally dramatic, so that ads look more like short films. In the same year that Burger King ditched its iconic “Have It Your Way” campaign, it found another way to infuse its brand with the idea of respecting individual expressive choice. During San Francisco’s 2014 gay pride week, Burger King sold “Proud Whoppers” wrapped in rainbow paper.¹⁴³ Consumers, wondering how these burgers were different, opened the rainbow wrapper and saw the message, “We Are All the Same Inside.”¹⁴⁴ The burgers, in fact, were the same. The company videotaped joyful public reactions and featured it on social media.¹⁴⁵ All proceeds from the Proud Whoppers supported scholarships for LGBT (lesbian, gay, bisexual, transgender) children.¹⁴⁶

Burger King took a stand on a divisive political and religious issue that had nothing to do with the product that it sold. Through this creative cause marketing, the brand was infused with a new shot of joy and meaning. Such leadership may signal an openness to cultural change even when the legal process lags behind or fails to respond to the public will. While demonstrating support for gay rights, the Proud Whoppers reaffirmed Burger King’s core brand value of honoring individual choice.¹⁴⁷ The creative team behind this project was highly innovative in subtly tying that reaffirmation to a current social conflict and showing the possibility of positive resolution through the experience of the

143. Katy Steinmetz, *Burger King Debuts Gay Pride Whopper*, TIME (July 1, 2014), <http://time.com/2947156/burger-king-debuts-gay-pride-whopper/> [https://perma.cc/R2TJ-MZQ7].

144. *Id.*

145. Brainstorming Mkt&Com, *Burger King Proud Whopper*, YOUTUBE (July 3, 2014), https://www.youtube.com/watch?v=_MUbIh987fM.

146. Bruce Horovitz, *Burger King Sells Gay Pride Whopper*, USA TODAY (July 1, 2014, 9:05 PM), <http://www.usatoday.com/story/money/business/2014/07/01/burger-king-gay-pride-burger-parade-fast-food-gay-rights/11903861/> [https://perma.cc/69VW-NDSY].

147. See Press Release, Burger King Worldwide, Inc., Be Your Way at Burger King Restaurants (May 20, 2014), <https://www.bk.com/news-press/be-your-way-burger-king-restaurants> [https://perma.cc/DV73-G6BE].

brand. It was not until the following year that the Supreme Court decided *Obergefell v. Hodges*,¹⁴⁸ a five to four decision holding that the U.S. Constitution guarantees the right to marry to same-sex couples.¹⁴⁹

Other brand owners in the same industry chose to distance themselves from this trend. Chick-fil-A's mission is expressly aligned with traditional Christian values.¹⁵⁰ All of its stores are closed on Sundays to permit its workers a day of rest.¹⁵¹ Its promise to its workers stems from its long-standing corporate commitment to family and community. In 2012, Chick-fil-A President and CEO Dan Cathy told the Baptist News, "We are very much supportive of the family—the biblical definition of the family unit. We are a family-owned business, a family-led business, and we are married to our first wives. We give God thanks for that."¹⁵² After the *Obergefell* decision, the *Wall Street Journal* reported that Cathy tweeted his disappointment, expressing it was a "sad day" for America.¹⁵³ Cathy quickly deleted the tweet, and the company retreated from public commentary critical of gay rights. Subsequently, it elected to affirm its Christian values through donations to like-minded causes instead of public commentary.¹⁵⁴ Notwithstanding this history, the company permitted an Iowa Chick-fil-A to donate sandwiches to a gay pride picnic, as an affirmation of its corporate support for community.¹⁵⁵

Despite new federal protections for gay rights, many communities and families remain divided on the issue. Whether the divisions are described as traditional/progressive, rural/urban, red/blue, or Democratic/Republican, trademark owners can refresh public perception of how brands fit in with contemporary experience while

148. 135 S. Ct. 2584 (2015).

149. *Id.* at 2599.

150. Emma Green, *Chick-fil-A: Selling Chicken with a Side of God*, ATLANTIC (Sept. 8, 2014), <http://www.theatlantic.com/business/archive/2014/09/chick-fil-a-selling-chicken-with-a-side-of-god/379776/> [<https://perma.cc/UT2C-4VJ3>].

151. *Who We Are*, CHICK-FIL-A, <https://www.chick-fil-a.com/About/Who-We-Are> [<https://perma.cc/NJ3M-WYWD>].

152. K. Allan Blume, 'Guilty as Charged,' *Cathy Says of Chick-fil-A's Stand on Biblical & Family Values*, BAPTIST PRESS (July 16, 2012), <http://www.bpnews.net/38271> [<https://perma.cc/C3MG-WSDL>].

153. Charles Passy, *Deleted Tweet from Chick-fil-A Head Calls Gay Ruling 'Sad Day'*, WALL ST. J. (June 26, 2013, 5:54 PM), <http://blogs.wsj.com/speakeasy/2013/06/26/deleted-tweet-from-chick-fil-a-head-calls-same-sex-ruling-sad-day/> [<https://perma.cc/TCU4-33WU>].

154. Josh Israel, *Why Chick-fil-A's Anti-LGBT Giving Is Still a Problem*, THINKPROGRESS (Feb. 2, 2016), <https://thinkprogress.org/why-chick-fil-as-anti-lgbt-giving-is-still-a-problem-88634cd34a81#.5ltc6r487> [<https://perma.cc/P5DH-W6JB>].

155. Mallory Schlossberg, *An Iowa Chick-fil-A Is Donating to a Gay Pride Picnic*, BUS. INSIDER (June 4, 2015, 5:14 PM), <http://www.businessinsider.com/chick-fil-a-donates-to-gay-pride-picnic-2015-6> [<https://perma.cc/X3CQ-8QS9>].

simultaneously taking a stand illustrating that these divisions may be overcome.

Kodak achieved this kind of artful bridge in its three-minute advertisement called “Understanding.”¹⁵⁶ The film depicts a country boy’s terror as his traditional family discovers he is gay.¹⁵⁷ Through this advertisement, Kodak reminded consumers that it still makes products that transform memories into photos while affirming its corporate ideals of trust, respect for personal dignity, recognition, and celebration.¹⁵⁸ The resonant message (depicted visually to emphasize the power of photography) is that even in the most divisive political times, love can transcend the boundaries created by expected social norms.¹⁵⁹

While cultural leadership may be expressed as a creative way to catch public attention, it may also be used proactively. If a brand owner sees a risk of negative press on the horizon, acts that affirm positive values may defray criticism. An example of this approach may be seen through Adidas’s actions regarding Native American sports mascots. As a supplier to the Washington Redskins, the Cleveland Indians, and the Atlanta Braves, it risked criticism for profiting from racially disparaging symbols.¹⁶⁰ In 2015, a federal district court cancelled the federal trademark registration for the Washington Redskins mark on the ground that it might disparage Native Americans.¹⁶¹ In the wake of this decision, the sports world has been divided between those who support keeping traditional symbols in athletics and those who insist that Native Americans should not be dehumanized as mascots.¹⁶² Bruce Allen, the president of the Washington Redskins, has repeatedly insisted that the team will not, under his watch, change the name even if it creates a barrier for building the team a new stadium.¹⁶³ Yet some sports

156. Kodak Motion Picture Film, *Understanding—A 35mm Film by Director Terry Rayment*, YOUTUBE (Dec. 19, 2016), <https://www.youtube.com/watch?v=sZBrowcWnMU>.

157. *Id.*

158. *The Kodak Values*, KODAK, http://www.kodak.com/global/en/corp/corpResponsibility/kodakvalues_en.jhtml?pq-path=2300595/12986/9555 [<https://perma.cc/G7BX-HWUZ>].

159. See Kodak Motion Picture Film, *supra* note 156.

160. Thomas Barrabi, *Washington Redskins Name Controversy: Team Criticizes Adidas’ Program to Help High Schools Replace Native American Mascots*, INT’L BUS. TIMES (Nov. 6, 2015, 12:11 PM), <http://www.ibtimes.com/washington-redskins-name-controversy-team-criticizes-adidas-program-help-high-schools-2173289> [<https://perma.cc/NKR8-XDAR>].

161. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 453 (E.D. Va. 2015).

162. Steve Wulf, *Why Use of Native American Nicknames Is an Obvious Affront*, ESPN (Sep. 3, 2014), http://www.espn.com/espn/otl/story/_/id/11426021/why-native-american-nicknames-stir-controversy-sports [<https://perma.cc/PG3P-F247>].

163. John Keim, *Bruce Allen: Redskins Won’t Change Name in Order to Build New Home*, ESPN (Aug. 17, 2015), http://espn.go.com/nfl/story/_/id/13454083/washington-redskins-not-drop-name-stadium-president-bruce-allen-says [<https://perma.cc/FU95-XR38>].

commentators see the name change as inevitable.¹⁶⁴ In response, Adidas took a stand offering to donate design services to any “high school in America that wants to change their logo or mascot from potentially harmful Native American imagery or symbolism.”¹⁶⁵ The company also stated that “[it] will provide financial assistance to schools who want to change their identity to ensure the transition is not cost prohibitive.”¹⁶⁶

Through this offer, Adidas was able to affirm the importance of youth sports as a force that bridges racial barriers and brings communities together. Its offer implied that its beliefs align with those against using Native American people as mascots. In this way, Adidas strove to align its brand with the idea that sports are a vehicle for overcoming racism.¹⁶⁷ Adidas Executive Board member Eric Liedtke explained:

Extraordinary things happen because of sports There are countless stories—Jesse Owens at the 1936 Olympics, Jackie Robinson breaking the color barrier, Billie Jean King igniting a women’s movement. Today, we can add another story on how sports bring people together and provide common ground to ignite change.¹⁶⁸

Leveraging sports as a vehicle for overcoming racial stereotypes has been used by other consumer product companies.¹⁶⁹ In a year when the Black Lives Matter movement was emerging as a vocal response to

164. Mike Wise, *Daniel Snyder Can’t See That the Future Is Here*, ESPN (Sept. 24, 2015), http://espn.go.com/nfl/story/_/id/13724289/washington-redskins-name-change-inevitable [https://perma.cc/NL9Y-UDVK].

165. *Adidas Announces Support for Mascot Name Changes Ahead of White House Tribal Nations Conference*, ADIDAS: NEWS STREAM (Nov. 5, 2015), <http://news.adidas.com/US/Latest-News/adidas-Announces-Support-For-Mascot-Name-Changes-Ahead-Of-White-House-Tribal-Nations-Conference/s/7197ec89-d0fe-4557-b737-cd27dc76aba1> [https://perma.cc/2C6U-M67D].

166. *Id.*

167. *See id.*

168. *Id.*

169. *See, e.g.*, Top 10 Trailers, *Nike—“Snow Day” Commercial [Full HD] 1080p*, YOUTUBE (Jan. 21, 2016), <https://www.youtube.com/watch?v=mEzOgCLBLPY>. An example can be seen in Nike’s 2015 advertisement “Snow Day.” In the ad, Nike showed an idealized American neighborhood. *Id.* The athletes live in modest homes and knock on each other’s doors to get everyone to play outside. *Id.* The ad is idealistic and nostalgic. It is a neighborhood where friends know each other and go out to play. *Id.* The film features twenty famous sports figures—some black, some white, some women, and some men. *See id.*; *see also* Tim Nudd, *Nike Welcomes Winter with Epic, Star-Studded, Two-Minute ‘Snow Day’ Commercial*, ADWEEK (Oct. 29, 2015, 12:18 PM), <http://www.adweek.com/adfreak/nike-welcomes-winter-epic-star-studded-two-minute-snow-day-commercial-167827> [https://perma.cc/7Y8L-HJSR].

police brutality targeted against people of color, the desire to act as a change agent required careful consideration.¹⁷⁰

Brand owners run the risk of being seen as trivializing serious issues and misappropriating their cultural currency by using the issues to promote their products for private monetary benefits. A 2017 Pepsi ad illustrates this risk. Pepsi tried to create a unifying ad about the peaceful resolution of a protest. Its “Live for Now Moments” ad depicted Kendall Jenner modeling while a diluted peace parade passed her.¹⁷¹ She joined in, and diffused the mild tension by offering a good-looking and fun-loving police officer a soda.¹⁷² The ad was harshly criticized for appropriating civil rights and Black Lives Matter imagery in a diluted context and trivializing the serious issues of police brutality and racial injustice in America.¹⁷³ Two days after its release, Pepsi pulled the ad and issued the following apology, “Pepsi was trying to project a global message of unity, peace and understanding. Clearly we missed the mark and we apologize. We did not intend to make light of any serious issue. We are removing the content and halting any further rollout.”¹⁷⁴ Despite this response, the ad remains available on YouTube, where it was viewed over 7 million times in the week following its release.¹⁷⁵

This example demonstrates the great care that must be taken to act effectively as a change agent. If serious political and cultural issues are watered down in an ad, the project may backfire. Brand owners must tread a fine line when speaking to cultural tensions. Portraying a purchased product as a solution to cultural and political issues may be perceived as tone deaf, especially if the issue is not treated seriously. While the examples discussed above involve attempts to affirm positive brand identities in contrast to generalized social and political tensions, the next Section explores the use of brands to induce legislative change.

170. *About Us*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [<https://perma.cc/JR4N-NBMZ> (staff-uploaded archive)]

171. Kendall and Kylie, *Kendall Jenner for PEPSI Commercial*, YOUTUBE (Apr. 4, 2017), <https://www.youtube.com/watch?v=dA5Yq1DLsmQ>.

172. *Id.*

173. Daniel Victor, *Pepsi Pulls Ad Accused of Trivializing Black Lives Matter*, N.Y. TIMES (Apr. 5, 2017), <https://www.nytimes.com/2017/04/05/business/kendall-jenner-pepsi-ad.html> [<https://perma.cc/6DYQ-RZ8K>]; Angela Watercutter, *Pepsi's Kendall Jenner Ad Was So Awful it Did the Impossible: It United the Internet*, WIRED (Apr. 5, 2017, 3:12 PM), <https://www.wired.com/2017/04/pepsi-ad-internet-response/> [<https://perma.cc/37W6-HXL5>].

174. Press Release, Pepsi Statement Re: Pepsi Moments Content (Apr. 5, 2017), www.pepsico.com/live/pressrelease/pepsi-statement-re--pepsi-moments-content04052017 [<https://perma.cc/Y2DR-7WYJ>]; see Victor, *supra* note 173; Watercutter, *supra* note 173.

175. Kendall and Kylie, *supra* note 171 (reflecting 9,921,888 views as of May 8, 2017).

B. Political Protests

Perhaps the boldest way for brand owners to be explicit about where they stand on political issues is to directly advocate for or against legislation. One may expect businesses to advocate for legislation that benefits their industries. Sometimes, new business models argue for legal reforms so that the regulatory environment supports growth for their industry. Start-ups, like Uber and Airbnb, emerge in regulatory gray areas, and, as they achieve popularity, they may leverage their user communities to support legislative action to help their business models succeed.¹⁷⁶

A dramatic example of this strategy was the technology industry's takedown of proposed federal copyright legislation in 2011.¹⁷⁷ To appreciate the magnitude of this victory, one must remember how easily the content industries achieved expanded copyright protection in preceding decades.¹⁷⁸ In 2011, Congress was poised to pass legislation that could force search engines to block access to sites that were accused of copyright infringement.¹⁷⁹ Just as Congress was about to take a vote on the measure, technology industry leaders, including Wikipedia, Google, Craigslist, and Reddit, banded together to "go dark."¹⁸⁰ These sites were unavailable for an entire day, displaying nothing more than a message protesting the legislation.¹⁸¹ *Forbes* reported that the tech industry revolt "achieved a stunning victory, sending Congress into a tailspin of retreat from bills that seemed certain, only months ago, to pass with little notice or resistance."¹⁸²

176. Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 383 (2017).

177. Protect IP Act Of 2011, S. 968, 112th Cong. (2011–2012); Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011–2012); Larry Downes, *Who Really Stopped SOPA, and Why?*, FORBES (Jan. 25, 2012, 1:15 AM), <http://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why/#21db7eef5ed0> [https://perma.cc/VW24-5ZAU].

178. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 134–38 (2004).

179. Protect IP Act Of 2011, S. 968, 112th Cong. (2011–2012); Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011–2012); Mark Lemley, Davis S. Levine & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34, 34 (2011).

180. Downes, *supra* note 177; John Ribeiro, *Wikipedia, Craigslist, Other Sites Black Out Against SOPA at Midnight*, PCWORLD (Jan. 18, 2012, 12:10 AM), http://www.pcworld.com/article/248324/wikipedia_craigslist_other_sites_black_out_against_sopa_at_midnight.html [https://perma.cc/YZ8H-CG8R].

181. Jenna Wortham, *A Political Coming of Age for the Tech Industry*, N.Y. TIMES (Jan. 17, 2012), <http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-antipiracy-bills.html?pagewanted=all> [https://perma.cc/WX5H-NGJ2].

182. Downes, *supra* note 177.

Other mark owners use this strategy to affirm brand values by protesting legislation on social issues.¹⁸³ Legislative protest is an especially salient way to identify a brand with a particular value because it is targeted and specific, and lends itself well to a consistent message. Through such action, brand equity may be affirmed and employed as a catalyst for meaningful political reform.

When state legislative proposals conflict with a firm's business ethics, strategic brand owners may find a clear and effective foil for affirming brand values. In March of 2016, North Carolina became a case study for this dynamic after the North Carolina General Assembly passed the Public Facilities Privacy and Security Act, better known as HB2.¹⁸⁴ The statute required people to use the public restroom matching their "biological sex" (defined as the gender marked on one's birth certificate), eliminated the right to sue for discrimination in state court, and rescinded local authority so that cities and counties could not enact their own antidiscrimination protections.¹⁸⁵ HB2 provoked intense controversy. To many, it marked a sharp turn to the right for North Carolina—a state once thought of as relatively progressive.¹⁸⁶ Dan Blue, a North Carolina state senator, said the bill "repeals 50 years of non-discrimination efforts" and "would be the single most discriminatory act in the country. This is a direct affront to equality, civil rights, and local autonomy."¹⁸⁷

After HB2's passage, many states and brand owners questioned whether engagement with North Carolina would compromise their values. Some affirmed their commitment to equality by severing ties with North Carolina.¹⁸⁸ The State of New York¹⁸⁹ and the cities of San

183. See James B. Stewart, *Corporations No Longer Sit Idly By on Discrimination*, N.Y. TIMES (Mar. 31, 2016), https://www.nytimes.com/2016/04/01/business/corporate-north-carolina-perks-up-against-discrimination.html?_r=0 [<https://perma.cc/M2BC-ZZQC>].

184. Public Facilities Privacy & Security Act (H.B. 2), secs. 1.2–3, §§ 115C-521.2, 142-760, 2016-2 N.C. Adv. Legis. Serv. 1 (LexisNexis), *repealed by* An Act to Reset S.L. 2016-3 (H.B. 142), 2017 N.C. Sess. Laws __.

185. *Id.*

186. Amber Phillips, *How North Carolina's Controversial 'Bathroom Bill' Could Backfire on Republicans*, WASH. POST (Mar. 24, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/03/24/like-indiana-north-carolinas-controversial-lgbt-law-could-be-a-blessing-in-disguise-for-democrats/> [<https://perma.cc/3SU8-2JBM>].

187. Michelangelo Signorile, *How North Carolina Just Passed a Blood-Curdling Anti-LGBT Law Right Before Our Eyes*, HUFFINGTON POST (Mar. 24, 2016 8:48 AM), http://www.huffingtonpost.com/michelangelo-signorile/how-north-carolina-just-passed-anti-lgbt_b_9538470.html [<https://perma.cc/MMG2-9XBV>].

188. Merrit Kennedy, *N.Y. Restricts Public-Employee Travel to North Carolina over LGBT Law*, NPR (Mar. 29, 2016, 2:42 PM), <http://www.npr.org/sections/thetwo-way/2016/03/29/472268519/n-y-governor-bans-most-state-travel-to-north-carolina-over-lgbt-law> [<https://perma.cc/GZ6A-3EKR>].

Francisco and Seattle¹⁹⁰ banned all nonessential travel to North Carolina by public employees.¹⁹¹

Like these governments, some mark owners also cut ties with the state to affirm their core values. PayPal had planned to build a new global operations center in Charlotte, which would have brought 400 new jobs to North Carolina.¹⁹² Because of HB2, PayPal cancelled its plans.¹⁹³ On behalf of the company, Dan Schulman explained, “The new law perpetuates discrimination, and it violates the values and principles that are at the core of PayPal’s mission and culture. As a result, PayPal will not move forward with our planned expansion into Charlotte.”¹⁹⁴ The loss of these high-tech jobs represented only a portion of the lost opportunities to the Charlotte community. For example, the PayPal deal would have included \$480,000 for community college training.¹⁹⁵ Through this action, PayPal cast itself as a leading voice in support of equality.

Famous brand owners in the arts took up the protest as well. On April 8, 2016, Bruce Springsteen¹⁹⁶ cancelled his Greensboro, North Carolina, concert scheduled for that weekend and issued the following statement:

HB2—known officially as the Public Facilities Privacy and Security Act—dictates which bathrooms transgender people are permitted to use. Just as important, the law also attacks the rights of LGBT citizens to sue when their human rights are violated in the workplace. No other group of North Carolinians faces such a burden. To my mind, it’s an attempt by people who cannot stand

189. The State of New York owns a portfolio of trademarks incorporating its name including the design marks for “I (heart) NY” and “New York State of Opportunity[.]” I NY, Registration No. 4,224,966; NEW YORK STATE OF OPPORTUNITY, Registration No. 4,793,554.

190. The City of Seattle has registered the mark “STARTUPSEATTLE” in connection with economic development. STARTUPSEATTLE, Registration No. 4,985,673.

191. Kennedy, *supra* note 188.

192. See Erika Hayes, *North Carolina Feeling Effects of HB2*, WCNC.com (Apr. 6, 2016, 6:28 AM), <http://www.wcnc.com/news/politics/north-carolina-feeling-effects-of-hb2/121795067> [<https://perma.cc/BR4A-JJR7>].

193. Dan Schulman, *PayPal Withdraws Plan for Charlotte Expansion*, PayPal, Inc. (Apr. 5, 2016), <https://www.paypal.com/stories/us/paypal-withdraws-plan-for-charlotte-expansion> [<https://perma.cc/722F-KV5F>].

194. *Id.*

195. Rick Rothacker, Ely Portillo & Katherine Peralta, *PayPal Withdraws Plans for Charlotte Expansion over HB2*, CHARLOTTE OBSERVER (Apr. 5, 2016, 10:56 AM), <http://www.charlotteobserver.com/news/business/article70001502.html> [<https://perma.cc/J5FK-NGN5>].

196. Bruce Springsteen owns a registered trademark in “Bruce Springsteen and the E Street Band[.]” BRUCE SPRINGSTEEN & THE E STREET BAND, Registration No. 1,697,409.

the progress our country has made in recognizing the human rights of all of our citizens to overturn that progress. Right now, there are many groups, businesses, and individuals in North Carolina working to oppose and overcome these negative developments. Taking all of this into account, I feel that this is a time for me and the band to show solidarity for those freedom fighters. As a result, and with deepest apologies to our dedicated fans in Greensboro, we have canceled our show scheduled for Sunday, April 10th. Some things are more important than a rock show and this fight against prejudice and bigotry—which is happening as I write—is one of them. It is the strongest means I have for raising my voice in opposition to those who continue to push us backwards instead of forwards.¹⁹⁷

Other entertainers also took the opportunity to distance their brands from the values embodied by the North Carolina legislation. Some performers, like Beyoncé, performed in North Carolina as planned, but harshly criticized the legislation.¹⁹⁸ The Dixie Chicks also appeared but spoke out against HB2 by giving their fans “No Hate in Our State” hats.¹⁹⁹

197. *A Statement from Bruce Springsteen on North Carolina*, BRUCE SPRINGSTEEN (Apr. 8, 2016), <http://brucespringsteen.net/news/2016/a-statement-from-bruce-springsteen-on-north-carolina> [https://perma.cc/X8SC-MAZC].

198. Claire Zillman, *Here's Where Beyoncé Stands on North Carolina's 'Bathroom Bill'*, FORTUNE (May 5, 2016, 8:18 AM), <http://fortune.com/2016/05/05/beyonce-north-carolina-transgender-bathroom> [https://perma.cc/ALQ7-7HKC].

199. *Dixie Chicks Take Unique Route in Protesting North Carolina Bathroom Bill*, ROLLING STONE (Aug. 18, 2016), <http://www.rollingstone.com/country/videos/dixie-chicks-protest-north-carolina-bathroom-bill-w435083> [https://perma.cc/M7LH-3MKT].

Figure 2: No Hate in Our State²⁰⁰

The world-famous violinist Itzhak Perlman, a Jew who has been bound to a wheelchair for most of his life, has created a classical music brand²⁰¹ that personifies empathy for intersectional minorities.²⁰² In response to HB2, Perlman attempted to negotiate a deal with the North Carolina Symphony so that he could perform under protest.²⁰³ He offered to donate his proceeds to an organization fighting for HB2's repeal, and sought to include a statement in the concert program criticizing the legislation.²⁰⁴ Three days before the show, the North Carolina Symphony told Perlman that "the state would not allow that statement."²⁰⁵ After cancelling the concert, Perlman explained that, as someone with a disability, his actions had to reflect his deeply held beliefs.²⁰⁶

200. Brian Mack (@Brian Mack), FACEBOOK (Aug. 13, 2013), <https://www.facebook.com/brian.mack.33/posts/1190785034314870> [<https://perma.cc/2YP7-2M6Y> (staff-uploaded archive)]

201. ITZHAK PERLMAN, Registration No. 5,123,068.

202. See Gabrielle Kaplan-Mayer, *Itzhak Perlman on Accessibility Challenges*, N.Y. JEWISH WEEK (Feb. 15, 2017, 8:01 AM), <http://jewishweek.timesofisrael.com/itzhak-perlman-on-accessibility-challenges-2/> [<https://perma.cc/Q6J9-VVD9>].

203. Anastasia Tsioulcas, *Itzhak Perlman on Canceling in North Carolina: 'I Had to'*, NPR: DECEPTIVE CADENCE (May 18, 2016, 3:48 PM), <http://www.npr.org/sections/deceptivecadence/2016/05/18/478556368/itzhak-perlman-on-canceling-in-north-carolina-i-had-to> [<https://perma.cc/97LF-9AEL>].

204. *Id.*

205. *Id.*

206. Perlman issued the following statement:

As my fans know, I have spent a lifetime advocating against discrimination towards those with physical disabilities and have been a vocal advocate for treating all people equally. As such, after great consideration, I have decided to cancel my May 18th

The symphony was caught in a difficult position. Perlman was one of the star performers of the year.²⁰⁷ Yet, the orchestra's existence depends largely on state financial assistance.²⁰⁸ In 2016, twenty-nine percent of the symphony's monetary support came from the North Carolina legislature, and some of it was in nonrecurring funds.²⁰⁹ At that time, unlike many other symphony orchestras,²¹⁰ the North Carolina Symphony did not own any registered marks in its name. This inattention to the protection and meaning of its mark may have detracted from strategic thinking about whether the symphony is an arts organization committed to specific expressive values. Such strategic planning might have allowed it to articulate a mission that could help make difficult choices, such as the one it faced with Perlman's visit. In the end, it bowed to state pressure.²¹¹

Like the symphony, many other public and private institutions began to fear that state support would be taken from anyone who spoke out against HB2.²¹² North Carolina lobbyists reported they were warned by members of the North Carolina General Assembly "that if they or their clients spoke out against HB2, they could expect retribution."²¹³ According to Dana Fenton, lobbyist for the city of Charlotte, American Airlines reported that it was on "high alert" that "state lawmakers will

concert in North Carolina with the North Carolina Symphony as a stand against House Bill 2. As Attorney General Loretta Lynch recently stated, HB2 "is about a great deal more than just bathrooms. [It] is about the dignity and respect we accord our fellow citizens." I couldn't agree more and will look forward to returning to North Carolina when this discriminatory law is repealed.

Itzhak Perlman (@Itzhakperlmanofficial), FACEBOOK (May 17, 2016), <https://www.facebook.com/Itzhakperlmanofficial/posts/10154045664370977> [<https://perma.cc/9YWF-DVVZ>] (alteration in original).

207. See Press Release, North Carolina Symphony, North Carolina Symphony Announces 2015/16 Season (Jan. 25, 2015), www.ncsymphony.org/news/index.cfm?nid=639 [<https://perma.cc/992F-3CR6>].

208. N.C. SYMPHONY, REPORT TO THE COMMUNITY 2015/16, at 5 (2016), <http://www.ncsymphony.org/mediacenter/comreport2016.pdf> [<https://perma.cc/LF3Y-WNHH>].

209. *Id.* at 5.

210. See, e.g., BOSTON SYMPHONY ORCHESTRA, Registration No. 1,576,911; HOUSTON SYMPHONY, Registration No. 4,431,687; DALLAS SYMPHONY, Registration No. 1,795,313; INDIANAPOLIS SYMPHONY ORCHESTRA, Registration No. 1,617,115; ORCHESTRA IOWA, Registration No. 3,707,969; SAN FRANCISCO SYMPHONY, Registration No. 1,851,740.

211. See Tsioulcas, *supra* note 203.

212. Laura Leslie, *Lobbyists: Lawmakers Turn Up Pressure to Quiet HB2 Opponents*, WRAL.com (May 11, 2016), <http://www.wral.com/lobbyists-lawmakers-seek-to-quiet-hb2-opponents/15698344/> [<https://perma.cc/2G8D-X66Q>].

213. Michael J. Gerhardt & Robert H. Tiller, Op-Ed, *In Light of HB2 Free Speech Threats, Ethics Probe Seems Warranted*, NEWS & OBSERVER (May 26, 2016, 4:30 PM), <http://www.newsobserver.com/opinion/op-ed/article80119212.html> [<https://perma.cc/7LZH-8BRS>]; see also Leslie, *supra* note 212.

target tax breaks on jet fuel in response to the company's opposition to House Bill 2[.]”²¹⁴

Such threats raise important constitutional questions. The First Amendment unequivocally prohibits government officials from “abridging the freedom of speech[.]”²¹⁵ Both state and federal officials are bound by this basic value.²¹⁶ The Supreme Court has emphasized the centrality of this point to core American values, explaining that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²¹⁷ The First Amendment guarantees a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]”²¹⁸

One may expect the North Carolina General Assembly to defend the pressure it put on the symphony by arguing that it may mandate whether political speech may be expressed in a government program.²¹⁹ It may also contend that speech made in the commercial context (i.e. Perlman's paid gig) warrants less First Amendment protection than, for example, statements made in electoral politics. These arguments have been successful in government limits on speech in certain contexts, such as what may appear on state issued license plates.²²⁰

The North Carolina General Assembly would be correct in those assertions, but if they were litigated, First Amendment doctrine would not extend as far as the state may like to push it. While state actors may choose to fund particular expressive activities in government programs and may support only one point of view in those contexts, they may not withdraw financial support to punish independent critical speakers, especially in forums traditionally known for open public debate.²²¹ For

214. Steve Harrison & Ely Portillo, *American Airlines on 'High Alert' Lawmakers Will Target Tax Breaks over HB2 Opposition*, CHARLOTTE OBSERVER (May 18, 2016, 4:26 PM), <http://www.charlotteobserver.com/news/local/article78441862.html> [<https://perma.cc/RG6M-4MM3>].

215. U.S. CONST. amend. I.

216. *Gitlow v. New York*, 268 U.S. 652, 664–72 (1925).

217. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted).

218. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

219. *See Rust v. Sullivan*, 500 U.S. 173, 193. (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”).

220. *Walker v. Texas Division, Sons of Confederate Veterans*, 135 S. Ct. 2239, 2250 (2015).

221. *Rust*, 500 U.S. at 193–200 (“[T]he existence of a Government ‘subsidy,’ in the form of Government-owned property, does not justify the restriction of speech in areas that have ‘been traditionally open to the public for expressive activity,’ or have been ‘expressly

example, the First Amendment prohibits municipalities from cancelling advertising with news organizations in retaliation for critical commentary.²²²

Threatening to withdraw state funding in retaliation for political speech is also unconstitutional. In *Citizens United*, the Supreme Court affirmed that state action “to control or suppress speech may operate at different points in the speech process” and that the First Amendment forbids action that could result in suppression of speech.²²³ One does not need to assert First Amendment rights when they stand with the government. This right was a gift that the founders left to the dissenters. The right to be free from government censorship “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”²²⁴

A second argument the state may assert is that speech in the commercial context is not entitled to full First Amendment protection. States do have broader leeway to regulate commercial speech and may impose content-based restrictions on it, but only to further interests such as protecting the public from false advertising or speech that is fraudulent or misleading.²²⁵ Speech that does no more than propose a commercial transaction is solidly within the commercial speech category that the government may regulate to avoid public deception.²²⁶ This exception is not insubstantial. All federal and state trademark laws fall within it.²²⁷ The ability to regulate commercial speech is driven by the

dedicated to speech activity.’ Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment” (citations omitted)).

222. *El Dia Inc., v. Rossello*, 165 F.3d 106, 110 (1st Cir. 1999) (holding that a First Amendment violation occurs when a government agency cancels substantial advertising contracts in retaliation for editorials criticizing the government); *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 132 (2d Cir. 1998) (holding that the public transportation authority’s removal of a bus advertisement that was arguably critical of the mayor was unconstitutional).

223. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336–37 (2010).

224. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

225. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65, 68–69 (1983); *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975).

226. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 & n.24 (1976) (“Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem.”).

227. *Taubman v. Webfeats*, 319 F.3d 770, 774–75 (6th Cir. 2003) (explaining that if an alleged infringer’s use of a mark is commercial its regulation as confusing or misleading commercial speech is outside the realm of First Amendment protection); 6 MCCARTHY ON

content of the speech, not the identity of the actor.²²⁸ Speech about a political issue that is not transactional is not commercial speech even if it is spoken by a corporate actor.²²⁹ Such words could be fully protected by the First Amendment.²³⁰ Advertisements that both propose a sale and contain political commentary do not neatly fall into either category.²³¹

If such speech is deemed commercial, a court will apply the test adopted in *Central Hudson Gas and Electric Corp. v. Public Service Commission*²³² to determine if the state may restrict it.²³³ Under this test, a court should

determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.²³⁴

Accordingly, advertisements that speak to current political issues have been afforded full First Amendment protection even if deemed commercial speech.²³⁵

Pursuant to this doctrine, commercial speakers engaging in political speech are protected by the First Amendment.²³⁶ While a state may

TRADEMARKS AND UNFAIR COMPETITION § 31:142 (4th ed. 2015) (“The Supreme Court has stated that: ‘The government may ban forms of communication more likely to deceive the public than to inform it.’ As Justice Blackmun remarked: ‘A listener has little interest in receiving false, misleading, or deceptive commercial information.’ For these reasons, false commercial speech is not protected by the First Amendment and can be banned entirely. Similarly, the Supreme Court noted that ‘[m]isleading advertising may be prohibited entirely.’ Another way to state the rule is that ‘false commercial speech receives no First Amendment protection . . .’” (citations omitted)).

228. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

229. See *id.* at 561–63.

230. See, e.g., *Bolger*, 463 U.S. at 65 (“With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances.” (citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 538–39 (1980); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978))).

231. See *Bolger*, 463 U.S. at 65–68.

232. 447 U.S. 557 (1980).

233. *Bolger*, 463 U.S. at 68–75.

234. *Cent. Hudson*, 447 U.S. at 564.

235. See, e.g., *Bolger*, 463 U.S. at 75 (holding that pamphlets advertising prophylactics and providing information about public health issues related to their use was commercial speech protected by the First Amendment, and holding the government’s attempt to regulate such speech unconstitutional).

236. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

selectively fund expression that it seeks to promote or prohibit content-neutral categories of speech for certain state organizations, it may not target particular speakers for viewpoint based political speech.²³⁷

In light of this First Amendment freedom, HB2 has become a stark background against which brand owners may affirm their commitment to equality. Staying apolitical in such environments may be difficult. Brand owners must consider whether conducting business in states that enact discriminatory legislation will risk the public perception that they share the values of the state.

Despite threats of retribution from the North Carolina legislature, many continued to cancel North Carolina business engagements.²³⁸ In the summer of 2016, the National Basketball Association (“NBA”) decided to move its All-Star Game out of North Carolina to protest the law.²³⁹ The NBA had threatened to move the game if the law was not repealed, and the commissioner was disappointed that the state legislature did not bow to that pressure.²⁴⁰ On September 12, 2016, the National Collegiate Athlete Association (“NCAA”) announced that the seven championship games scheduled to be played in North Carolina would be pulled out of the state.²⁴¹ In announcing this decision, its Board of Governors explained that fidelity to its mission gave it little choice: “This decision is consistent with the NCAA’s long-standing *core values* of inclusion, student-athlete well-being and creating a culture of fairness.”²⁴²

Business disengagement from North Carolina has had a significant economic impact on the state. By May of 2016, researchers found that North Carolina had already lost 1,250 jobs and “\$40 million in business

237. See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

238. See Ryan Bort, *A Comprehensive Timeline of Public Figures Boycotting North Carolina Over the HB2 ‘Bathroom Bill’*, NEWSWEEK (Sept. 14, 2016, 5:06 PM), <http://www.newsweek.com/north-carolina-hb2-bathroom-bill-timeline-498052> [https://perma.cc/6FUW-YGRY].

239. Tim Bontemps, *NBA Will Move 2017 All-Star Game from Charlotte over HB2 Law*, WASH. POST (July 21, 2016), <https://www.washingtonpost.com/news/sports/wp/2016/07/21/report-nba-will-move-2017-all-star-game-from-charlotte-to-new-orleans-over-hb2-law/> [https://perma.cc/D6AP-3YWG].

240. See *NBA Statement Regarding 2017 NBA All-Star Game*, NBA (July 21, 2016, 5:36 PM), <http://www.nba.com/2016/news/07/21/nba-statement-all-star-game-relocation-from-charlotte/> [https://perma.cc/F5LB-8TCE].

241. Scott Gleeson, *NCAA to Move 7 Championships from North Carolina due to HB2 Law*, USA TODAY (Sept. 12, 2016, 7:25 PM), <http://www.usatoday.com/story/sports/college/2016/09/12/ncaa-to-relocate-championship-events-north-carolina-house-bill-2/90284584/> [https://perma.cc/RT6D-R7XR].

242. *NCAA to Relocate Championships from North Carolina for 2016–17*, NCAA (Sept. 12, 2016, 6:10 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-relocate-championships-north-carolina-2016-17> [https://perma.cc/M8L7-K3FU] (emphasis added).

investment.”²⁴³ This figure does not include consequential losses to the state economy from cancelled hotel rooms, restaurants, and other services.²⁴⁴ Because HB2 has been held to violate federal equal protection laws,²⁴⁵ public schools that comply with it are facing the potential loss of “\$4.8 billion in federal grants and contracts.”²⁴⁶ Taking these and other variables into account, a report from the Williams Institute, a UCLA think tank, projected that HB2 could cost North Carolina \$5 billion annually.²⁴⁷

North Carolina is not the only state to have suffered negative economic effects after passing discriminatory legislation. When Indiana passed a similar law in March of 2015, Indianapolis alone lost \$60 million in convention spending.²⁴⁸ The state subsequently amended the law to limit its application to religious organizations.²⁴⁹ The Georgia legislature enacted the Free Exercise Protection Act that would permit discrimination based on religious principles.²⁵⁰ In March of 2016, Governor Deal vetoed it, stating, “It’s time to take another deep breath. I see what’s happening in North Carolina I would hope that many . . . pushing for it would not want the state of Georgia to go through that kind of scenario.”²⁵¹ Georgia political leaders are reportedly watching North Carolina before taking additional steps.²⁵²

Pressure from brand owners ultimately brought down HB2 and the governor who signed it. In the 2016 election, the North Carolina

243. CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION, DIVERSITY, AND DEVELOPMENT: THE LEGAL AND ECONOMIC IMPLICATIONS OF NORTH CAROLINA’S HB2, at 1, 29 (2016).

244. See Paul A. Specht, *Raleigh Visitors Bureau: Event Cancellations Due to HB2 Quadruple Economic Losses*, CHARLOTTE OBSERVER (Apr. 18, 2016, 5:46 PM), <http://www.charlotteobserver.com/news/business/article72510252.html> [<https://perma.cc/3BPB-9MDW>].

245. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded*, __ S. Ct. __ (2017) (mem.), 2017 WL 855755.

246. MALLORY & SEARS, *supra* note 243, at 1.

247. *Id.*

248. Andrew Bender, *Indiana’s Religious Freedom Act Cost Indianapolis \$60 in Cost Revenue*, FORBES (Jan. 31, 2016, 2:28 PM), <https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/#108bfbc52e2a> [<https://perma.cc/U5BX-PNUL>].

249. Phillips, *supra* note 186.

250. H.B. 757, 153d Gen. Assemb., Reg. Sess. (Ga. 2016).

251. Greg Bluestein, *Nathan Deal on Religious Liberty: ‘I See What’s Happening in North Carolina, Mississippi’*, AJC.COM (Apr. 13, 2016), <http://politics.blog.ajc.com/2016/04/13/nathan-deal-its-time-for-another-deep-breath-on-georgias-religious-liberty-debate/> [<https://perma.cc/PD76-FFGF>].

252. Aaron Gould Sheinin, *N.C. Failure to Repeal ‘Bathroom Bill’ Will Impact Georgia Debate*, AJC.COM (Dec. 21, 2016, 7:35 PM), <http://www.ajc.com/news/state--regional-govt--politics/failure-repeal-bathroom-bill-will-impact-georgia-debate/kBIGHxjVWZBSP6kZDQidvK/> [<https://perma.cc/9CW4-98WU>].

Republican governor who signed HB2 into law, Governor McCrory, was defeated by his Democratic opponent, Roy Cooper, by 10,277 votes.²⁵³ This result is particularly interesting when viewed in contrast to other statewide races. President Trump captured North Carolina by 173,315 votes, and Richard Burr, the incumbent Republican senator, defeated his Democratic opponent by 267,211 votes.²⁵⁴ Political scientists have not yet sorted through the North Carolina election results to determine what caused this ticket splitting but it certainly suggests that party loyalty alone did not drive many voting decisions. Exit polls from the 2016 election indicate that HB2 may have had an impact, as two-thirds of those polled stated they opposed HB2.²⁵⁵ Mac McCorckle, a Duke University professor and former consultant to North Carolina's former Governor Easley, called the voter dissatisfaction with McCrory on this issue "a reaction to a mess This is what governors get held responsible for."²⁵⁶

North Carolina's commitment to basketball is the value that ultimately led to the law's undoing. In March of 2017, the NCAA announced it would bring no tournaments to North Carolina unless the state repealed HB2 before the end of the month.²⁵⁷ In response to this pressure, the North Carolina General Assembly voted to repeal HB2 on March 30, 2017, by passing HB 142.²⁵⁸ Governor Cooper signed the compromise bill later that day.²⁵⁹ HB 142 permits only the State to regulate multiple occupancy restrooms operated in public schools and state agencies.²⁶⁰ It also guts local authority to protect their most

253. *11/08/2016 Official General Election Results—Statewide*, N. C. STATE BD. OF ELECTIONS, (Dec. 13, 2016, 10:42 AM), http://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=COS&contest=0 [https://perma.cc/K4LL-UN8Y (staff-uploaded archive)].

254. *Id.*

255. Mark Barrett, *How Could McCrory Lose While Trump Wins NC?*, CITIZEN-TIMES (Nov. 10, 2016, 6:37 AM), <http://www.citizen-times.com/story/news/local/2016/11/09/how-could-mccrory-lose-while-trump-wins-nc/93544174/> [https://perma.cc/K5BF-EXXB].

256. *Id.*

257. Scott Gleeson, *What Will The NCAA Do About North Carolina's 'Compromise' to HB2?*, USA TODAY (Mar. 30, 2017, 11:09 PM), <https://www.usatoday.com/story/sports/college/2017/03/30/ncaa-nba-north-carolina-house-bill-2/99825520/> [https://perma.cc/N8BW-L7NA]; Press Release, NCAA, NCAA Reaffirms North Carolina Championship Stance (Mar. 23, 2017), <http://www.ncaa.org/about/resources/media-center/news/ncaa-reaffirms-north-carolina-championship-stance> [https://perma.cc/ZL86-P6UD].

258. Public Facilities Privacy & Security Act (H.B. 2), secs. 1.2–3, §§ 115C-521.2, 142-760, 2016-2 N.C. Adv. Legis. Serv. 1 (LexisNexis), *repealed by* An Act to Reset S.L. 2016-3 (H.B. 142), 2017 N.C. Sess. Laws __; see Richard Fausset, *Bathroom Law Repeal Leaves Few Pleased in North Carolina*, N.Y. TIMES (Mar. 30, 2017), https://www.nytimes.com/2017/03/30/us/north-carolina-senate-acts-to-repeal-restrictive-bathroom-law.html?emc=edit_na_20170330&nl=breaking-news&nid=25520147&ref=cta [https://perma.cc/ZEY2-HVYR].

259. *Id.*

260. *Id.*

vulnerable citizens by preventing local governments from regulating “private employment practices” or “public accommodations” through December 1, 2020.²⁶¹

Time will tell if the new law will change public perception of North Carolina as an easy foil for brand owners seeking to affirm a commitment to equality. Both liberals and conservatives criticized the compromise.²⁶² It unequivocally reflects North Carolina’s commitment to basketball, but not for protecting its LGBT citizens from discrimination.

On April 4, 2017, the morning after the University of North Carolina at Chapel Hill won its sixth National Basketball Championship game, the NCAA “reluctantly” lifted its ban on hosting games in North Carolina stating that the state “minimally achieved a situation where we believe N.C.A.A. championships may be conducted in a nondiscriminatory environment.”²⁶³ This example illustrates the power of a strong brand tied to specific core values. The demise of HB2 and the NCAA’s cautious reaction suggest that this drama is not over in North Carolina. Further, the HB2 example may influence other states, like Georgia and Texas, that have watched the North Carolina drama play out before enacting similar legislation.

261. *Id.*

262. See, e.g., News Release, Kellie Fiedorek, Alliance Defending Freedom, North Carolina Politicians Cave to Corporate, NCAA Bullies in Repeal of HB2 (Mar. 30, 2017), <http://www.adflegal.org/detailspages/press-release-details/north-carolina-politicians-cave-to-corporate-ncaa-bullies-in-repeal-of-hb2> [<https://perma.cc/Q9TP-FZVV>] (“North Carolina has failed families by giving in to hypocritical bullies like the NCAA and billion-dollar corporations. Every North Carolinian deserves to have their privacy respected in intimate settings like locker rooms and restrooms. One of government’s essential duties is to protect the citizens it governs, not to create uncertainty about whether showers and locker rooms will still be safe for women and girls. North Carolina’s economy is booming, so the state should not let the NCAA and others dictate the state’s policies and sell out their citizens’ interests based on flat-out lies about an economic doomsday that never happened”); Mark Joseph Stern, *The HB2 “Repeal” Bill is an Unmitigated Disaster for LGBTQ Rights and North Carolina*, SLATE (Mar. 30, 2017, 4:20 PM), http://www.slate.com/blogs/outward/2017/03/30/hb2_repeal_bill_is_a_disaster_for_north_carolina_and_lgbtq_rights.html [<https://perma.cc/5MCB-HV3A>] (“As soon as the ‘compromise’ bill was revealed, however, LGBTQ groups lined up against it, arguing, in essence, that the cure would be worse than the disease. They are absolutely correct. The measure, HB 142, would be an unmitigated disaster for LGBTQ rights. It substitutes the old anti-trans policy for new, equally cruel one—and prevents cities from protecting their own LGBTQ residents. This bill is not a compromise. It is a capitulation.”).

263. Press Release, NCAA, NCAA Board of Governors’ Position on HB2 Repeal (Apr. 4, 2017), <http://www.ncaa.org/about/resources/media-center/news/ncaa-board-governors-position-hb2-repeal> [<https://perma.cc/5Y8N-NDR8>].

CONCLUSION

While the laws of the United States are designed to support a commitment to core values, they also provide the opportunity for civic reinvention. The same may be said of brands. Innovation in leadership must begin with an opportunity. Taking a stand on divisive socio-political issues is risky. Many organizations do not dare to take a political stand. Advocating or partnering with politicians may be especially risky because a firm cannot control actors outside its sphere of influence. Those who choose to speak on public issues risk alienating those who disagree, but like the NCAA on HB2, they stand an excellent chance of being heard and linked to specific core values. When a political cause aligns with a brand's mission, seizing the opportunity to say so can provide a creative platform for inspiring trust. Protests against legislation or political actors provide an open stage to clarify brand values in direct contrast to state action. Savvy brand owners may seize this opportunity to gain loyalty and market share by using corporate power to advance their vision of a better world. In a polarized political environment, entrepreneurial brand owners may set themselves apart from their more cautious competitors by exerting power over politics, and consumer communities may leverage this power by holding brand owners accountable to their expressed values.